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In The

Supreme Court of the United States

October Term, 1963

BRAZOSPORT SAVINGS & LOAN ASSOCIATION, FORT BEND FEDERAL SAVINGS & LOAN ASSOCIATION, AND GULF COAST SAVINGS & LOAN ASSOCIATION,
Appellants

v.

JIMMY PHILLIPS, AMERICAN SAVINGS & LOAN ASSOCIATION, J. M. FALKNER, BANKING COMMISSIONER OF TEXAS, ET AL.,
Appellees

On Appeal From the Supreme Court of Texas

JURISDICTIONAL STATEMENT

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On Appeal From the Supreme Court of Texas

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Texas entered March 20, 1963, reversing the judgment of the Court of Civil Appeals, Third Supreme Judicial District of Texas, and affirming the judgment of the 126th District Court of Travis County, Texas, which decreed that appellants take

nothing in their suit attacking the validity of an order of the Banking Commissioner of Texas and the statute under which he purported to act.

OPINIONS BELOW

The opinion of the Supreme Court of Texas is under the style, Jimmy Phillips, et al. v. Brazosport Savings and Loan Association, et al., is reported, 366 S.W. 2d 929, and shown in the Appendix, at p. ii, et seq.

The opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, under the style, Brazosport Savings & Loan Association, et al. vs. Jimmy Phillips, et al., is reported, 353 S.W. 2d 78, and shown in the Appendix, at p. xxv et seq.

The opinion of the Supreme Court of Texas on the original appeal of this case, under the style Brazosport Savings & Loan Associaion, et al. v. American Savings & Loan Association, et al., is reported, 161 Tex. 543, 342 S.W. 2d 747, and is in the Appendix at p. xxxvii, et seq.

All emphasis is ours unless otherwise indicated.

GROUNDS FOR JURISDICTION

(1)

Nature of the Proceeding

Appellants, as holders of franchises to conduct sav-

ings and loan businesses, contested the chartering by the Banking Commissioner of Texas of their competitor American Savings & Loan Association, and appealed to the 126th District Court of Travis County from his order granting this charter and franchise. The Texas statute governing creation of savings and loan associations (and hereinafter set forth) made no provision for an appeal by protestants from an adverse decision of the Banking Commissioner and the trial court abated the suit on grounds the court had no jurisdiction to entertain the appeal. This action was affirmed in the Court of Civil Appeals (326 S.W. 2d 567, Justice Hughes dissenting). The Supreme Court granted a writ of error and reversed, holding that appellants as owners of valuable franchises, had an inherent right to appeal, as guaranteed by the Fourteenth Amendment, and were to be afforded a trial under the "substantial evidence" rule. (342 S. W. 2d 747)

It was appellants' position before the Banking Commissioner (as hereinafter set forth in greater detail) that that official must follow the promulgated departmental rules, and receive all evidence, pro and con, at the public hearing, and that failure to do this would result in a denial of appellants' rights to Due Process and Equal Protection, as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

In the trial court it was appellants' position that the Commissioner had violated his departmental rule, his rulings, and the referenced provisions of the Four-

teenth Amendment, by receiving ex parte and secret evidence (including a secret report, prepared by his investigator), all in violation of appellants' rights, and that his action in chartering American Savings & Loan Association on such basis was void and of no force and effect.

(2)

Chronology of Judgment and Appeal

The date of the judgment of the Supreme Court of Texas appealed from is March 20, 1963 (Appendix, p. ii).

The date of the judgment and order of the Supreme Court of Texas overruling appellants' Motion for Rehearing is May 8, 1963 (Appendix, p. ii).

The Notice of Appeal was filed in the Supreme Court of Texas August 1, 1963. (Transcript, p. 96)

On September 10, 1963 the Supreme Court of Texas entered its order granting appellants an extension of time to and including October 21, 1963, to file this Jurisdictional Statement and docket the case (Appendix, p. xlviii).

(3)

Statutory Provision Conferring Jurisdiction

This appeal is filed under 28 USCA § 1257 (2), "By appeal, where is drawn in question the validity

of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

(4)

Cases Sustaining Jurisdiction

The final judgment here appealed from was one reversing the judgment of the Court of Civil Appeals, and affirming the judgment of the trial court, which judgment decreed that appellants (plaintiffs) take nothing by their suit, and that all relief prayed for by them be denied (Transcript, p. 91). The judgment of the Supreme Court is final in every sense within the rule of *Clark, et al. v. City of Kansas City*, 172 US 334, 336, 19 S. Ct. 207, 43 L. ed. 467, at 468, " 'the rule is well settled and of long standing that a judgment or decree to be final, within the meaning of that term, as used in the acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case. ****.' "

The Banking Commissioner of Texas purported to act under authority of Art. 881a-2, Vernon's Anno. Civ. Stat. of Texas (Acts, 1929, 41st Legislature of Texas, 2nd C.S., p. 100, ch. 61, § 2), which reads as follows:

> "When any persons shall file a proposed charter or articles of agreement as is elsewhere herein provided, if it appears to the satisfaction of the Banking Commissioner of Texas that the mini-

mum capital required has been paid in cash into the treasury of the association upon subscription for shares, the Banking Commissioner of Texas shall ascertain from the best sources at his command, and by such investigation as he may deem necessary, the expense of such investigation to be paid by the incorporators, whether the character, responsibility and general fitness of the persons named in the articles of incorporation are such as to command confidence and warrant belief that the business of the proposed building and loan association will be honestly and efficiently conducted in accordance with the intent and purpose of this Act, and whether the public convenience and advantage will be promoted by allowing such proposed building and loan association to be incorporated and engaged in business, and whether the population in the neighborhood of such place and in the surrounding country affords a reasonable promise of adequate support for the proposed building and loan association. If it shall be satisfied concerning the several matters specified, the Banking Commissioner of Texas shall issue under his official seal a certificate reciting in substance the filing in its office of the articles of incorporation; that such articles conform to all requirements of the law, and that they have been approved, whereupon the persons named in the articles of association, their associates and successors, shall become a corporate body for the period for which they were organized, and shall exercise such powers as are herein granted, and such other powers as are necessary to enable such association to carry out the purpose of its organization, not inconsistent with the provisions of this Act, but before such association shall proceed to do business it shall adopt and have approved by the Banking Commissioner of Texas by-laws for the regulation and management of its business, not incon-

sistent with the provisions herein provided. * * * *."

The crux of this appeal is the composite action of the State of Texas: the Banking Commissioner's conduct under this statute, and his flagrant ignoring of the departmental rules governing procedure[1] so that he caused a special investigation to be made, and received a secret and ex parte investigator's report, and relied thereon and on *other* proceedings, to issue his order chartering appellants' competitor, American; *and* the action of the Supreme Court of Texas, in upholding as valid and constitutional, both the Commissioner's order and the statute, as against appellants' claims that this action was in violation of their rights to Due Process and Equal Protection of the Laws. The following cases support the proposition that this Court has jurisdiction of the appeal to remedy this composite action under § 1257(2).

In *Wheeling Steel Corporation v. Glander*, 337 US 562, 570, 69 S. Ct. 1264, 93 L. ed. 1544, on appeal from judgments of the Supreme Court of Ohio affirming ad valorem tax assessments on intangible property, it was held, p. 1550:

> "The State action, which is reviewable under the Fourteenth Amendment, is the composite result of both legislation and its judicial interpretation."

In *Mooney v. Holohan*, 294 US 103, 112, 55 S. Ct.

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[1]Rules and Regulations for Building and Loan Associations, Chapter 2, appear, page 69, the Transcript of pleadings, and as Plaintiffs' Exhibit 6-B, of the volume of Exhibits, and provide for a public hearing on notice. See Appendix, p. xlix.

340, 79 L. ed. 791, while denying leave to file a writ of habeas corpus on grounds such relief had not been sought first in the state courts, the Court said, p. 794:

> "And the action of prosecuting officers on behalf of the State, like that of administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment. That Amendment governs any action of a State, 'whether through its legislature, through its courts, or through its executive or administrative officers.' "

Orders of administrative agencies (such as a university Board of Regents), entered pursuant to a state statute, requiring courses in military science, are "statutes," within the meaning of § 1257 (2): "The meaning of 'statute of any state' is not limited to acts of state legislatures. It is used to include every act legislative in character to which the State gives sanction, no distinction being made between acts of the state legislature and other exertions of the state lawmaking power." *Hamilton, et al. v. Regents of the University of California*, 293 US 245, 258, 55 S. Ct. 197, 79 L. ed. 343 at 350. So, too, in *Lathrop v. Donohue*, 367 US 820, 824, 81 S. Ct. 1826, 6 L. ed. 2d, 1191, when the Supreme Court of Wisconsin created the "State Bar of Wisconsin" by order, appeal under § 1257 (2) was held proper, p. 1194:

> "We think that the order is a 'statute' for the purposes of § 1257 (2). Under that section, the legislative character of challenged state action, rather than the nature of the agency of the State performing the act, is decisive of the question of

jurisdiction. It is not necessary that the state legislature itself should have taken the action drawn in question. In construing the similar jurisdictional provision in the Judiciary Act of 1867, 14 Stat. 385, we said: 'Any enactment, from whatever source originating, to which a State gives the force of law is a statute of the State, within the meaning of the clause cited relating to the jurisdiction of this court.' Williams v. Bruffy, 96 US 176, 183, 24 L ed 716, 717. We likewise said of the provision of the Act of 1925, 43 Stat. 936, which is the present § 1257 (2): '. . . the jurisdictional provision uses the words 'a statute of any State' in their larger sense and is not intended to make a distinction between acts of a state legislature and other exertions of the State's law-making power, but rather to include every act legislative in character to which the State gives its sanction.' King Mfg. Co. v. City Council of Augusta, 277 US 100, 104, 105, 72 L ed 801, 805, 806, 48 S Ct 489. ****."

There can be no doubt that the act of franchising is legislative in character;[2] and the franchises of appellants have been specifically held to be vested property rights. *Brazosport Savings & Loan Ass'n., et al.*

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[2]Texas Constitution, Art. 1, § 17 reads in part: "***** all privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof."

Indeed, "prior to 1913 each savings and loan association in Texas was chartered by a special act of the Legislature. In 1913 the Thirty-third Legislature in its first called session, July 21, to August 19, passed House Bill No. 17: An Act to provide for the incorporation *** of *** building and loan associations; and for the government and control of the same; placing same under the control **** of the Commissioner of Insurance and Banking, ****." See *Cashin, "Savings and Loan in Texas,"* Univ. of Texas, 1956.

v. American Savings & Loan Ass'n., et al., Tex Sup. Ct. 342 S.W. 2d 747 at 750. The order granting the franchise to American was legislative in every proper sense. As in *Atchison, Topeka & Santa Fe Railway Co. v. P.U.C. of California*, 346 US 346, 348, 74 S. Ct. 92, 98 L. ed. 51, on appeal from a judgment of the Supreme Court of California upholding grade crossing orders against due process attacks, the rule is applicable, p. 57:

> "We think the Commission's orders must be treated as an act of the legislature *****. The Commission has construed § 1202 as authorizing these orders. The appellants presented squarely to the Supreme Court of California their contention that **** these orders take their property without due process of law******. In sustaining the Commission's orders by denying writs of review, the Supreme Court of California upheld the statute as applied by the Commission, and the cases are properly here on appeal. ****."

This Court has not heretofore hesitated to take jurisdiction of appeals in order to protect the rights of the holders of valuable franchises from violations of the Fourteenth Amendment resulting in unlawfully created competition. *Frost v. Corporation Commission of Oklahoma*, 278 US 515, 49 S. Ct. 235, 73 L. ed. 483 (discussed, infra).

Moreover, the Court has heretofore recognized building and loan associations to be "financial institutions of major importance to the credit system of the State," and in *Veix v. Sixth Ward Building and Loan Ass'n. of Newark*, 310 US 32, 36, 60 S. Ct. 792, 84

L. ed. 1061, accepted the appeal from an adverse judgment in New Jersey, to review a statute limiting rights to withdraw shares, saying, p. 1064, 1065:

> "The ruling was based squarely on the constitutionality of the Act of 1932. ****. The case is here on appeal ***. As this section gives a review to this Court only of state statutes held valid by the highest court of a state against an attack of repugnancy to the Constitution of the United States, we deem ourself limited to the Act of 1932. **** "

Again, in *Charleston Federal Savings & Loan Ass'n., et al. v. Alderson, State Tax Com'r.*, 324 US 182, 185, 65 S. Ct. 624, 89 L. ed. 857, on appeal from a judgment of the Supreme Court of West Virginia affirming tax assessments against certain federal and state associations, the court took jurisdiction as a petition for writ of certiorari (being a tax case), and said, p. 861:

> "Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court (cases cited)."

At every level, both administrative and judicial, appellants have sought protection for, and have squarely presented the question of their rights under the Fourteenth Amendment, and now tender "the underlying constitutional issues in clean-cut and concrete form,

unclouded by any serious problem of construction relating either to the terms of the questioned legislation or to its interpretation by the state courts." See *Rescue Army v. Municipal Court of City of Los Angeles*, 331 US 549, 584, 67 S. Ct. 1409, 91 L. ed. 1666, 1686, where appeal was dismissed for failure to so present the issues in a case involving pending prosecution by the state for solicitations without a permit.

This suit directly challenges, not only the validity of the Banking Commissioner's *order*, but the *statute* upon which it is based, and the Court should take jurisdiction, because "The Federal question presented, being one which requires analysis and exposition for its decision, is not frivolous, ****." *Milheim v. Moffat Tunnel Improvement Dist.*, 262 US 710, 716, 43 S. Ct. 694, 67 L. ed. 1194, 1199 (testing validity of a Colorado statute for creation of a tunnel). In addition, this record clearly reflects that "The validity of the statute under the federal Constitution was by the petition appropriately drawn in question and in substance the decision of the state supreme court is in favor of its validity. ****. Its judgment does not depend upon characterization of the statute or mere interpretation of the language employed. ****." *Chesebro v. Los Angeles County Flood Control Dist.*, 306 US 459, 463, 59 S. Ct. 622, 83 L. ed. 921, 925. on appeal from a judgment of the Supreme Court of California, testing validity of a statute authorizing a board to levy assessments in a flood control district, appellant having duly invoked his constitutional rights. Furthermore, this case is well within the rule, stated in *James Stewart & Co. v. Sadrakula*, 309 US

94, 98, 60 S. Ct. 431, 84 L. ed. 596, 600, an appeal from New York testing validity and applicability of a safety statute to federally owned work areas:

> "The language of the Court of Appeals and the record show indubitably that a determinative federal question was decided. The conclusion as to the continued vitality of existing state statutory regulations in the protection of workmen in ceded federal areas makes it substantial. The motions to dismiss or affirm the appeal are denied."

We do not know of any decision of this Court which sanctions the practice of a state administrative agency basing its decisions upon a special, private investigation and the report thereof, where those with valuable interests at stake have no opportunity to know, and no chance to meet and refute the information contained in such secret report. To the contrary, as hereinafter shown, this Court has on various occasions condemned such practice, as have most of the state courts in this country. Such a practice of basing decisions on secret evidence makes a travesty of the Fourteenth Amendment. This question, involving basic concepts of justice, "**** is not so clearly lacking in merit that upon mere citation of our decisions it may be put aside as not requiring further consideration." *Alton Railroad Co. v. Illinois Commerce Commission*, 305 US 548, 550, 59 S. Ct. 340, 83 L. ed. 344 at p. 346, on appeal from the judgment of the Illinois Supreme Court affirming a commission order requiring maintenance of a switch at the railroad's expense, in violation of its rights to due process.

What the decision complained of has done is to uphold as valid a statute authorizing the Banking Commissioner to franchise a competitor on the basis of secret evidence in violation of Due Process, and this, even though the administrative rules require a public hearing. As in *Offield v. New York, N. H. & H. Railroad Co.*, 203 US 372, 377, 27 S. Ct. 72, 51 L. ed. 231, 236, in error to the Supreme Court of Connecticut on the question of the validity of a state statute authorizing a railroad to condemn minority shares of stock, we ask the conclusion that "These contentions raise a Federal question and we cannot say that it is frivolous."

QUESTIONS PRESENTED

I.

The rights of appellants, as quasi-public institutions operating under valuable franchises, to be protected from competition which is created by an administrative procedure which does not afford appellants Due Process and Equal Protection of the Laws, as required by the Fourteenth Amendment.

II.

The unconstitutionality of the State Banking Commissioner's order and action, as violative of the Due Process and Equal Protection of the Laws Clauses of the Fourteenth Amendment (when proceeding under promulgated departmental rules providing for a public hearing at which all evidence for an against an application for a franchise shall be received), in basing his decision on

a secret and ex parte investigator's report and evidence which appellants have no opportunity to know and meet.

III.

Whether, in public proceedings afforded by departmental rules at which all evidence is to be received, the statute, Art. 881a-2, Vernon's Anno. Civ. Stat. of Texas, can operate to exempt the Banking Commissioner from compliance with the fundamentals of fair play, the rules, and the requirements of the Due Process and Equal Protection of the Laws Clauses of the Fourteenth Amendment of the Constitution of the United States; all, so that he can disregard the public proceedings and base his action on ex parte evidence and a secret report. And the invalidity of the statute when construed to afford such an exemption.

IV.

Inasmuch as the Supreme Court of Texas had declared that the *only* judicial review available to appellants from the adverse decision of the State Banking Commissioner made on ex parte and secret evidence is under the "substantial evidence" rule (as distinguished from a full trial *de novo*), so that the court is not free to make independent findings apart from the finding and decision of the Banking Commissioner, there is involved this question: the unconstitutionality of State action which fails, *at all levels*, both administrative and judicial, to afford appellants, as owners of vested property rights and in a proceeding involving their rights as against their competitors, a fair trial and equal opportunity to know and combat all the evidence; *and a right to*

an independent decision based upon all the evidence so spread upon the record, either by the administrative agency or by a court at the judicial level.

STATEMENT OF THE CASE

(1)

Administrative Proceedings

January 29, 1958, the Banking Commissioner and the Finance Commission of Texas promulgated certain rules of procedure to govern the Commissioner in proceedings involving applications for savings and loan franchises. January 30, 1958, the Commissioner announced to all associations that such rules "govern the establishment of" state chartered associations (Plf. Ex. 6-A, S.F. 49-50). Section 2.1 of the rules requires submission of various specific data, to enable the Commissioner to pass on such matters as responsibility, public convenience and advantage, insurance of accounts, independent quarters, management, adequacy of capital and support by the population. Section 2.2 requires setting of hearing date, publication of notice of hearing, and notice by mail, and public hearing (unless the application is not protested).

Art. 342-103, Vernon's Anno. Civ. Stat. of Texas created a State Finance Commission and a Building and Loan Section, and by Art. 342-114, this agency was authorized to "promulgate general rules and regulations not inconsistent with the Constitution and Statutes of this State, *** which rules shall be applicable alike to all State associations, etc. ***."

These rules appear as Ex. 6-B, of Exhibits. See Appendix, xlix.

These provisions appear in the Appendix, p. xlix et seq. Section 7.1 declares the rules to be "applicable alike to all State associations after their effective date, ***."

In answer to requests for admissions under local practice, the Banking Commissioner admitted that the rules do not provide for or authorize *any* exceptions as to application thereof (S.F. 17, Answers to Requests for Admissions, Tr. p. 79). He also admitted (S.F. 25, Tr. p. 80): "Admits that one of the primary purposes of the Rules and Regulations of January 29, 1958, *is to afford a public hearing at which all evidence for and against an application* for a savings and loan application *will be presented.*"

In relation to Rule 2.1, appellant Brazosport's attorney was unable to obtain any of the information called for by this rule prior to the hearing (S.F. 67-69, 70). The Commissioner first ruled that there would be a second hearing (S.F. 71), but at the conclusion of the public proceedings, ruled that there would be no further hearing, and that Brazosport could file a brief (Plf. Ex. 21, at p. 113), and Brazosport counsel put the question (idem, at p. 113):

> "Q. ***. As I understand it, if the applicant is going to offer anything further, it will be by public hearing?
>
> "Mr. Falkner: Sure; if they have anything else to offer we will get to it." (And see S.F. 83.)

Being firmly convinced that the "evidence" of Amer-

ican offered before the Commissioner was so paltry and incomplete as to not justify a franchise to it, appellant Brazosport, when filing its brief with the Commissioner, specifically stood on the record made, and in such brief (S.F. 519, Plf. Ex. 31, at pp. 4-6), claimed the protection of Rule 2.1 as affording a public hearing; warned that if any ex parte evidence was submitted in behalf of American's application, then appellants' rights to due process and equal protection would not be protected; pointed out that the evidence must be spread upon the record, cited *Ohio Bell Telephone Co. v. Public Utilities Com.*, 301 US 292, 81 L. ed. 1093, and the rules announced at 42 Am. Jur., Public Administrative Law, §§ 128 and 130, and against the possibility that any other evidence might be submitted, stated: "To any such procedure we most strenuously object, and invoke the protection of the Commissioner's own rule and the law applicable in such cases, *for we stand helpless to combat the applicant's case if the Commissioner is to consider any other evidence other than that adduced at the hearing.*" (Plf. Ex. 31, p. 6)

So much for the "public" part of the proceedings, except to add this: on January 23, 1959, the Banking Commissioner issued his order granting the franchise to American, which order recites, *inter alia* that on "the 15th day of December, 1958, came on to be heard an application for a charter *** and due notice having been given as provided by the Rules and Regulations *** and the applicants and all parties in protest to the application having appeared in person or by and through their attorneys, the Banking Commissioner

proceeded to hear and consider the evidence and the statements of counsel in support of said application and the evidence and statements of counsel in protest to said application. And it appearing to the Banking Commissioner, having heard and considered the application, the evidence, and the statements of counsel, both written and oral, that said applications should be (granted) for the following reasons: said application complies with the laws of the State of Texas and the Rules and Regulations for Building and Loan Associations, It Is Therefore Ordered, etc. ****." (Plf. Ex. 20, and see S. F. 75-76)

These solemn recitals of a decision based on the record give no warning of action on secret and ex parte evidence. We turn to the court proceedings.

(2)

Trial Court Proceedings

(a)

Pleadings

Appellants appealed the decision and in their Second Amended Original Petition, filed May 3, 1961 (Tr., pp. 10-11), alleged that they "understood that all evidence adduced in support of the application of Jimmy Phillips, et al. * * * was limited to that submitted at said public hearing, as in justice and fairness should be the case;" and that, there being no further evidence, then applicant had defaulted and failed to fur-

nish the data called for by the rules, and had failed to "meet and satisfy the proof required by law as to the several elements and considerations governing the grant of a charter," and the Commissioner's act in granting the charter was capricious, unreasonable and arbitrary. In the alternative, however, appellants in that petition alleged as follows (Tr. p. 11): that if the Commissioner had been presented other data, evidence, facts, etc. in support of the application, then this was contrary to the Rules and Regulations, and was in violation of plaintiffs' rights as preserved by the Due Process of the Law and Equal Protection of the Laws Clauses of the Fourteenth Amendment to the Constitution of the United States, plaintiffs having no chance to know, meet and refute any such ex parte evidence.

In preparing for trial, and by May 15, 1961, plaintiffs were able to make these allegations (by Plaintiffs' First Trial Amendment to Their Supplemental Petition ,filed May 15, 1961, Tr. 31, 32):

> "(4) Plaintiffs further say that the Commissioner, in acting and passing upon the application of defendant American ****** did receive ex parte information, evidence, data and other matters, in violation of the rules providing for a public hearing, and of the rights of plaintiffs and contrary to their rights to Due Process of Law as well as their rights under the rules of fair play. Further, that the nature of such evidence was not revealed to plaintiffs either at the hearing or before the Commissioner acted, and they have had no opportunity to examine the same, to contest it, or to otherwise rebut it, and have been denied

their Constitutional rights to Due Process of Law and Equal Protection of the Laws."

(b)

The Evidence

R. C. Findlay, president of appellant Brazosport, testified at the trial, that if the Commissioner had received any other information or facts or so-called evidence regarding this application, either before or after this hearing, it was never made accessible to him; that to his knowledge, the Commissioner never gave his association or any of the other protesting associations any opportunity to rebut or answer any such additional evidence; and that prior to the time the Commissioner entered his order on January 23, 1959, neither the Commissioner, nor anyone in his department, nor did the applicant or anyone for the applicant (American) ever reveal the reception in behalf of the applicant of any so-called evidence or facts or data or information other than the proceedings that took place on December 15, (i.e., at the public hearing). (S. F. 73) This testimony was never refuted.

Commissioner Falkner, called as a witness by appellants, was asked whether he had caused a field investigation to be made; he admitted that he had done this (S.F. 100). Demand was made on him to produce the report thereon, whereupon the Assistant Attorney General representing the Banking Commissioner at the trial objected, claiming this report to be confiden-

tial as in the case of reports made of *existing* associations, as provided by Article 1136a-9 of the Texas Penal Code (S.F. 101-102).

Commissioner Falkner having been called to testify under subpoena duces tecum (S.F. 104), was asked (S.F. 103):

> "Q. Are you willing to let me have the information, Mr. Falkner?
>
> "A. No, sir."

Thereafter, and during a recess, the Commissioner reconsidered, and "concluded that to make the information available is in the public interest" (S.F. 104). This "Report of Investigation" is Plf. Ex. 27, and as to it the Commissioner testified (S.F. 110):

> "Q. ***. Did you place into the record at the hearing, or otherwise inform any of the protestants, including these plaintiffs, as to the contents or nature or subject matter of that report?
>
> "A. No, sir, I never do, as to the contents of them.
>
> "Q. You realized, then, at the time of the hearing and up to the time you ordered, that only you and possibly some other personnel in your Department knew the contents of that report, is that correct?
>
> "A. Yes."

And he testified further (S.F. 111):

> "Q. Now, you, of course, knew, Mr. Falkner,

at the time of the hearing and at the time of your Order of January 23rd, that none of the protestants had had a chance to answer or rebut or meet any of the contents or the evidence or opinions expressed in this report, didn't you?

"A. Certainly I knew it. Those reports are never made public except under the order of the Court."

J. F. Crews, as president of American (S.F. 176), testified that a representative of the Banking Department visited him prior to December 15 (the hearing date), "and met and visited with each of the directors, met with all of them as a group and toured the area and visited with various other people" (S.F. 203). He said that he took the investigator around the area of Lake Jackson (proposed place of business), Brazosport, showed him the residential and commercial sections, took him to Freeport, and to the factories and plants there, and to the Dow Chemical Company industrial complex, and to the city of Angleton (S.F. 204). He testified that the investigator "talked with us primarily about the objectives to be accomplished with the savings and loan association," and that he told the investigator about his "operating policies" (S. F. 205), and said that the investigator stayed there "I think possibly two nights, so that he was there at least part of two days, one or two days, and possibly most of three days" (S.F. 205).

On cross examination by plaintiffs (these appellants), Crews stated (S.F. 225):

"Q. I see. Now, you say Mr. Benson came

down there and spent some time with you folks. Incidentally, did you—were you all billed for his trip by the Banking Department?

"A. Yes, sir, we were.

"Q. And you gave him a considerable amount of information, did you not?

"A. Yes, sir, I did.

"Q. You gave him all of the information you could muster in support of your application; is that substantially correct?

"A. I don't know that I would say that. I had a nice long visit on each of the two days with Mr. Benson.

"Q. And your conversations with him in general, the tenor of them, was whereby you were encouraging him and furnishing him with facts or arguments or what-have-you, in support of your application; is that generally true?

"A. Yes, sir.

"Q. Now,—and did you know that he proposed to return to Austin and give a confidential report to the Commissioner?

"A. I knew only, Mr. McKay, that he was there to investigate our application. As to what form or nature his report would take, I had no idea.

"Q. Now, you made no mention of his report and conversations with him in the public hearing held, did you?

"A. No, sir.

"Q. And you will recall, I believe, without reviewing the entire record, that it is true that Mr. Falkner did not reveal or make any mention of this special investigation that had been conducted, or the results of it?

"A. I don't recall that he did, no sir."

(c)

The Secret Report and Other Ex Parte Evidence

The Court may well gather, as is a fact, that this secret report was *highly* favorable to the applicant, American. It (Plf. Ex. 27) commented upon such matters as population, persons interviewed, description of location, trade area, economic aspects of area, residential conditions and prices, subdivision activities, other stores in the area, future commercial trends, and business activity, industrial plants and payrolls, other associations, and concluded as follows (p. 4 of Plf. Ex. 27):

"Lake Jackson, the most desirable residential area for the rapidly growing industrial city of Freeport, should provide needed funds and loan demand for additional building and loan service.

"During my investigation and interviews I formed the opinion that the area of Lake Jackson, Freeport and Clute will in the very near future again increase in population one hundred percent. The opinion is based upon the industrial program and the expansion of the port facilities now in

progress. I was led to believe also that the character, responsibility and general fitness of the persons named in subject Articles of Incorporation are such as to command confidence and warrant belief that the business of the proposed building and loan association will honestly and efficiently be conducted. It is my opinion a public convenience and advantage will be promoted.

"Favorable consideration be given subject application is recommended."

Commissioner Falkner testified that he had this investigation made to determine all the factors called for by the statute, supra, and Rule 2.1, supra. (S.F. 107). The Commissioner also testified that he considered this investigative report in determining his decision (S.F. 109). And, he testified on direct examination, over the objection that such would be ex parte to plaintiffs, that he *also had available information of various kinds obtained in connection with applications of other concerns for bank charters and savings and loan charters in the area* (S.F. 147-150).

(3)

Manner of Raising the Federal Questions

(a)

Trial Court

We have alluded to the brief filed with the Commissioner and the pleadings in this case, supra, raising the Federal questions, which are violations of the

rights of appellants under the Fourteenth Amendment.

The Trial Court ruled that appellants could not ask the Commissioner if he did not know that he had a duty to base his decision upon the evidence adduced at the public hearing (S.F. 112).

Appellants made their position clear to the Trial Court, reminding it that they had pleaded deprivation of due process and equal protection, and alleged affirmatively that the Commissioner had acted on a secret report, and that they invoked their rights under the department rules, and stated that "to go out and conduct a public hearing with the one hand, and with the other hand to go out and say, 'Now, you go out and investigate this thing privately for me, and let me have your own report about it, and I am going to consider that.' That makes the requirement of a public hearing, the American sense of fair play at these hearings, a farce." (S.F. 121). And when the Trial Court asked if the statute did not permit such an investigation, appellants reminded the judge that this Court had held in *I.C.C. v. L. & N. R. R. Co.*, 227 US 88, 33 S. Ct. 185, 57 L. ed. 431, that such a construction would nullify the right to a hearing, and quoted at length from the opinion (S.F. 121-122), and mentioned other cases, including those holding that the administrative agency must comply with its rules as to hearings (Cf., *Alexiou v. McGrath*, D.C., Dist. Columbia, 101 F. Supp. 421) (S.F. 123). To which the Trial Court replied: "** there is a distinction in my mind between a statute that specifically gave an adminis-

trative officer authority to do certain things, as distinguished from a statute that gave that administrative officer general authority to promulgate rules of procedure" (S.F. 126), and further commented that the cases cited (by appellants) regarding due process "are cases where the only evidence they had, or substantially the only evidence they had, was evidence gained through procedures and evidence not made public at a hearing." And the Trial Court observed that the Supreme Court of Texas "has repeatedly held that our administrative agencies in the determination of their decisions *can consider all of the information that they have at their disposal*" (S.F. 132); and followed this with the comment that he did not think there would be a deprivation of due process unless "if you have a situation where the only evidence you have was a private hunt, and so forth, ****." At conclusion of the trial, following argument, judgment was entered that appellants, as plaintiffs, take nothing (Tr., p. 91 and Appendix, p. xxxiii).

(b)

Court of Civil Appeals

On appeal to the Court of Civil Appeals, these parties, in their Appellants' Brief, by the First, Second and Fifth Points of Error (Brief, pp. 7-8, 19-25, 30-42), specifically attacked the Commissioner's order and the Trial Court's judgment upholding it as violative of their rights to Due Process and Equal Protection.

By their Eighth Point of Error, they pointed to the error of the Trial Court in so construing Art. 881a as authorizing the Commissioner to base his action on ex parte evidence, such a construction rendering the statute unconstitutional as violative of various constitutional provisions, including the Due Process and Equal Protection of the Laws Clauses of the Fourteenth Amendment (Brief, p. 9, 48-53). These points were fully briefed.

The Court of Civil Appeals' opinion (353 S.W. 2d 58), is reported in the Appendix, pp. xxv, et seq. That Court took note of the foregoing Points of Error (Appendix pp. xxvi, xxvii), observed that if the proceeding were illegal it need not consider the "substantial evidence" question (*idem*, xxviii), observed, among other contentions, that "appellants contend that the charter and certificate of American was granted in an *adversary* proceeding upon the strength of secret and ex parte evidence, and in violation of departmental rules and applicable law, and was arbitrary, capricious, unreasonable and unlawful; ****" (*idem*, xxx) pointed to certain of the admissions made by the Commissioner, to the Supreme Court's prior opinion in this case (Appendix, p. xxxvii) and concluded: "*** we are of the opinion that the action of the Commissioner in holding the hearing under the circumstances and in granting the charter and certificate to American was illegal."

This Court then reversed the judgment of the Trial Court and entered judgment "cancelling the charter and certificate of authority issued to American Sav-

ings and Loan Association, and enjoining the transaction of business thereunder."

(c)

Supreme Court of Texas

When appellees sought a writ of error in the Supreme Court of Texas, these appellants, by their "Respondents' Reply to Application for Writ of Error," filed in the Supreme Court, March 8, 1962, specifically again invoked their constitutional rights in their First and Second Counter Propositions (pp. 5, 6-16, 28-32, 33-48), and fully and in considerable detail, briefed these Federal questions.

Subsequently, by "Respondents' Post Argument Brief," appellants again fully presented, throughout that brief, the matter of their constitutional rights. Again, in "Respondents' Supplemental Reply Brief" (pp. 2-7), appellants sought protection of their rights under the Fourteenth Amendment.

Following the adverse decision of the Supreme Court of Texas these appellants, in their "Respondents' Motion for Rehearing," by Grounds of Error No. 1-5 (briefed, pp. 8-15), attacked the factual conclusions erroneously made by the Court, and by Grounds of Error, 6-11 (briefed, pp. 16-32), fully presented their constitutional claims to the Court. So fully and positively were these Federal questions presented at all levels, administrative and judicial, that we will not

burden this Statement with specific quotations thereof at this time, for we do not conceive that appellees will dispute the fact that appellants have fully raised the issues at every level and at every opportunity.

The Supreme Court of Texas treated these Federal questions in its opinion under the caption "(C) Evidence not Presented at the Hearing" (Appendix, p. xii, et seq.), saying, "Respondents contend that the Commissioner's relying on evidence not introduced at the hearing deprives them of due process of law and that judicial review under the substantial evidence rule does not cure that want of due process." (*idem*, xii)

The Supreme Court opinion refers to only some of the decisions cited by appellants, stating that the cited decisions of the Supreme Court of the United States fell in the category of *dictum*, on the point of the constitutional rights urged (*idem*, xiii), that others were distinguishable because the *statute* required a full hearing with the evidence "spread on the record" (*idem*, xiii, xiv), and stated that "Article 881a does not require a hearing of any kind. The rules, however, provide for a hearing in certain instances, but do not provide any procedure," and then distinguished a Florida decision, where a similar statute was involved, on grounds that that case involved a charge of "moral unfitness." The Court disposed of *Service v. Dulles*, 354 US 363, 77 S. Ct. 1152, 1 L. ed. 2d, 1403, on grounds that the Secretary of State had limited his own authority.

The Court said that "In any event, we think that re-

spondents have not been deprived of their procedural rights in this case. It has repeatedly been held by the Texas decisions that the Commissioner is not confined to the evidence actually brought out at the hearing. but may rely upon information disclosed by the office records (citing cases)." And the Court further stated: "Under these circumstances we find that no due process was denied respondents by the failure of the Commissioner to introduce the investigator's report at the hearing."

These rulings were, palpably, "of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court." Rule 15, Supreme Court Rules.

THE QUESTIONS ARE SUBSTANTIAL

(1)

As Related to the Savings and Loan Industry

This controversy has been of such importance in the State of Texas that the State Legislature, *during this litigation*, has *twice* legislated upon the subject of administrative control of savings and loan associations:

First, all authority has been taken from Banking Commissioner Falkner and entrusted to a Savings and Loan Commissioner. Acts 1961, 57th Leg. of Texas, p. 393, Ch. 198, § 2, amending Art. 342-205 (Banking Code of 1943), Vernon's Anno. Civ. Stat. of Texas.

Second, and shortly after the Supreme Court's opinion, by House vote March 27, 1963 and by Senate vote April 17, 1963, a new Savings and Loan Act was passed, effective January 1, 1964. Acts 1963, 58th Leg. of Texas, Ch. 113, at p. 269, Vernon's Texas Session Law Service. This law, of course, cannot aid appellants, but it is specifically directed to the purpose of preventing any such administrative abuse, in the future, of due process and equal protection as appellants have experienced.[4]

The impact of the Commissioner's conduct on appellants' franchises and businesses is seen in his admissions (S.F. p. 29, and Tr., p. 81-82) that in this area, *in one twelve-month period*, under his authority, three new associations had been put in business (Gulf Coast at Richmond, Ft. Bend County; First Savings at Alvin, Brazoria County; First Savings at Angleton, Bra-

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[4]As to applications for charters: Sec. 2:07 requires public notice and opportunity for any interested party to appear, present evidence and be heard: Sec. 2:08 provides that the Commissioner shall act on the data furnished with the application, the evidence adduced at such hearing and his official records, the statutory prerequisites: Sec. 11.11 requires that any interested party be afforded opportunity to present evidence and be heard, requires the Commissioner on request to keep a formal record of the proceedings and, requires decisions to be supported by findings of fact and conclusions of law. Sec. 11.12, in specifically permitting any interested party to have a judicial review, authorizes a stay, and subdivision (5) (b) directs that "the review of any other act, order, ruling or decision *** shall be tried by the court without a jury in the same manner as civil actions generally and all fact issues material to the validity of the Act, order, etc. *** complained of shall be redetermined in such trial on the preponderance of the competent evidence, but no evidence shall be admissible which was not adduced at the hearing *** or officially noticed in the record of such hearing."

zoria County). In Brazoria County alone, with the chartering of American in January, 1959, three associations were chartered in an approximate twelve-month period, and the Commissioner admitted that "*our records fail to reveal any instance in any county in Texas where as many as three new savings and loan associations were chartered during the same twelve-month period in a county comparable in population to Brazoria County.*" (S.F. 30) He further admitted that when he chartered American he acted with knowledge that Gulf Coast was operating at a loss (S.F. 30), and that First Savings at Alvin was not operating profitably (S.F. 31).

It has long been the rule of this Court that a state process franchising competition for those holding existing franchises must, because of the property rights involved, meet the standards of Due Process and Equal Protection of the Laws. *Frost v. Corporation Commission of Oklahoma*, 278 US 515, 49 S. Ct. 235, 73 L. ed. 483, cited, supra. And while the Texas Legislature has afforded *future* protection from the administrative wrongs like those here complained of, only this Court remains in a position to give appellants that protection of their constitutional rights to which they are entitled.

(2)

Cases Recognizing Similar Questions to be Substantial

There is a veritable legion of such decisions.[3] As here pertinent, this Court's decisions, holding contrary to the Supreme Court of Texas, have considered the questions presented to be substantial and the rights of those injured entitled to protection, whether viewed from the impact (a) of the statute, or (b) of failure to follow the departmental rules.

(a)

The Statute as Interpreted Presents Substantial Questions

Where the proceeding is under a statute authorizing the administrative agency to conduct investigations, this Court has nevertheless held that due process requires the evidence to be spread on the record. *I.C.C. v. L. & N. R. Co.*, 227 US 88, 93, 33 S. Ct. 185, 57 L. ed. 431, 434; *U.S. v. Baltimore & O. S. W. R. Co.*, 226 US 14, 20, 33 S. Ct. 5, 57 L. ed. 104, 107; *Crowell v. Benson*, 285 US 22, 47, 52 S. Ct. 285, 76 L. ed. 598, 610. In the *L. & N. Case*, 57 L. ed. at 434, the claim was that since the statute gave authority to the Commission to obtain information, the Commission could act thereon; the Court refused this contention, saying "But such a construction would nullify the right to a hearing—for manifestly there is no hearing when the

[3] The question is annotated, 99 L. ed. 460, "Administrative decision or finding based on evidence secured outside of hearing and without presence of interested party or counsel—federal cases"; and also, 18 ALR 2d 552 "Administrative decision or finding based on evidence secured outside of hearing, etc. ***."

party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute." In the *Baltimore & Ohio Case* this Court said, 57 L. ed. at p. 107:

> "****. We remark that it is stated in the Commissioner's report that they base their conclusion more largely upon their own investigation than upon the testimony of the witnesses. It would be a very strong proposition to say that the parties were bound in the higher courts by a finding based on specific investigations made in the case without notice to them."

Again, in *Crowell v. Benson*, supra (76 L. ed. at p. 610, et seq), the Court disapproved the argument that because the deputy commissioner, acting under the Longshoremen and Harbor Workers' Act, could make investigations, the hearing could be a mere formality, saying no such limitation should be read into the statute, and that the law contemplated notice and a public hearing, which "implies that all proceedings **** shall be appropriately set forth, and that whatever facts he may ascertain and their sources shall be shown in the record and be open to challenge and opposing evidence."

In *Southern Stevedoring Co. v. Voris*, 5th Cir., Texas, 190 F. 2d 275, of the same law, and the contention that it permitted "such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties," thus permitting use of ex parte reports, that Court said: "But this general provision does not, indeed it could not,

dispense with a right so fundamental in Anglo-Saxon law as the right of cross examination. Although administrative agencies may be relieved from observance of strict common law rules of evidence, their hearings must still be conducted consistently with fundamental principles which inhere in due process of law" (citing decisions of this Court).

(b)

Violations of Procedural Rules Which Afford Due Process Present Substantial Questions

Service v. Dulles, 354 US 363, 372, 77 S. Ct. 1152, 1 L. ed. 2d 1403, 1410, and *Vitarelli v. Seaton*, 359 US 535, 540, 79 S. Ct. 969, 3 L. ed. 2d 1012 are to the point. In *Service*, where the Secretary of State contended that he could override a departmental rule which, on affording a hearing on lower administrative levels, made that decision final if favorable to the employee, this Court denied the Secretary's right to nevertheless discharge, saying (1 L. ed. 2d at 1410) that it sustained the contention made: "*** namely, that regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and that this principle holds even when the administrative action under review is discretionary in nature." In *Vitarelli*, when the departmental rules requiring specification of charges, hearing on competent evidence, with right of the employee to cross examine were violated, this Court granted relief saying (3 L. ed. 2d at p. 1017): "**** departures from de-

partmental regulations in matters of this kind involve more than mere consideration of procedural irregularities." And, "**** scrupulous observance of departmental procedural safeguards is clearly of particular importance."

Violation—deliberate, we say—of the Banking Commissioner's rules providing for public hearing and reception of all evidence, brings into play the principles of *Yick Wo v. Hopkins*, 118 US 356, 373, 6 S. Ct. 1064, 30 L. ed. 220, 227, i.e., application of a rule, fair on its face "with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured *** by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. ****."

In this field, the case of *Thompson, et al. v. Spear, et al.*, 5th Cir., Texas, 91 F. 2d 430, 434, cer.den. 302 US 762, 82 L. ed. 592 involving the Railroad Commission of Texas, is apropos: "It cannot be said that, because the regulations **** were promulgated by the commission in the exercise of a discretionary power, the commission has the discretion to proceed or refrain from acting under them. Having promulgated a regulation that is valid, fair and just, it may not discriminate between those against whom it is intended to be enforced. Such enforcement would embody the very evils which would render it unlawful." And in *Alexiou v. McGrath, et al.*, D. C. Dist. of Columbia, 101 F. Supp. 421, at 424, the Court stated that once the Attorney General had established "the procedure af-

fording an opportunity for a fair hearing," the court "did not believe his discretion could be exercised arbitrarily in complete disregard of the record," and that consideration of matters outside the record made the hearing a nullity.*

The Supreme Court of Texas, as recently as 1957, has itself recognized the importance of construing a statute which does not on its face call for notice and due process, as implying such requirements, citing *American Power & Light Co. v. Securities and Exchange Com.*, 329 US 90, 67 S. Ct. 133, 91 L. ed. 103, and holding, in *Industrial Accident Board v. O'Dowd*, 157 Tex. 432, 303 S.W. 2d 763 at 766:

> "Obviously if the explicit provisions of a statute direct an administrative board to proceed without notice in contravention of the constitutional due process requirements (as in the Francisco case) there would be no room for a presumption that the Legislature intended that a notice be given. However, on the other hand, we must assume that the Legislature intended to enact a valid law, and in the absence of express language to the contrary, intended that the administrative board should proceed in accordance with constitutional requirements."

The Supreme Court of Texas has, however, specifically construed the instant statute to the contrary. We take it that this Court must accept the Texas Su-

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*The Texas courts have always heretofore held that administrative agencies are bound by their own valid rules. *Gulf Land Co. v. Atlantic Ref. Co.*, 134 Tex. 59, 131 S.W. 2d 73, 79.

preme Court's construction. *Kingsley International Pictures Corp. v. Regents of Univ. of N. Y.*, 360 US 684, 688, 79 S. Ct. 1362, 3 L. ed. 2d 1512, 1516. Such construction being one which permits the Banking Commissioner to make his decision on secret evidence, contrary to the rules of fair play calling for a public hearing, permits him to operate in the teeth of such decisions as *Morgan v. U. S.*, 304 US 1, at p. 18, 58 S. Ct. 773, 82 L. ed. 1129, at 1132, condemning use of "proposed findings" submitted ex parte, after the hearing; and *Greene v. McElroy*, 360 US 474, 496, 79 S. Ct. 1400, 3 L. ed. 2d 1377, at 1391, protecting one from a security clearance revocation based on secret and confidential reports not made available, because violating the "immutable" principle that when government action injures the individual, and its reasonableness depends on fact findings, the evidence must be disclosed. Surely, the substantiality of the Federal questions is strongly threaded into this controversy, where these appellants have been subjected to the administrative farce of a "public" hearing, with the order then based on a secret and confidential report.

(3)

The Limited Judicial Review Emphasizes the Substantiality of the Federal Questions

(a)

Application of Substantial Evidence Rule

Appellants' constitutional rights were at stake;

nevertheless, the Supreme Court of Texas decreed in its first opinion that appellants would only be entitled to prove "the Commissioner's action was illegal or without support *in substantial evidence*" (Appendix, p. xlvii). And again, in its instant decision, the Court said: "We hold that the Commissioner's order granting the charter is reasonably supported by *substantial evidence;* therefore, it is not arbitrary." (Appendix, p. xxiii).

Appellants embrace the proposition that, when constitutional rights are at stake, it is the duty of the courts to make their own independent examination of the record. *Napue v. Illinois*, 360 US 264, 271, 79 S. Ct. 1173, 3 L. ed. 2d 1217, 1222:

> "*****. The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting as it does, on our solemn responsibility for maintaining the Constitution inviolate. (cases cited) ****."

And so holding, this Court further recognized that " 'the duty rests on this court to decide for itself facts or constructions upon which federal constitutional issues rest.' "

We speak now to the anomaly, indeed, to the *hiatus* in the Texas procedure for judicial review of administrative action which, even when constitutional rights are involved, affords no more than a substantial evidence trial. Appellants' constitutional rights were violated at the administrative level, and the adminis-

trative decision and order is issued to their injury. Appellants reach the court house *already saddled* with an administrative order based on secret and ex parte evidence. In Texas, the "substantial evidence" rule fixes a heavy burden.[7] The Texas Supreme Court has

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[7]It is held in Texas that whether an agency "actually heard sufficient evidence to sustain the order is not material." *Cook Drilling Co. v. Gulf Oil Corp.*, 139 Tex. 80, 161 S.W. 2d 1035.

Under the substantial evidence rule "The court will inquire, not whether the agency actually heard sufficient evidence, but whether the facts that existed at the time of the agency's decision or order were such as to justify its action." 1 Texas Jurisprudence 2nd, Administrative Law, etc., § 43, p. 683. And again, "The court will indulge certain presumptions in favor of the validity of the administrative decision or order **** Such presumptions are rebuttable; but they cast on one who contests an agency's action the burden of proof as to its invalidity. Consequently, where the substantial evidence rule applies, the party aggrieved by an administrative decision must assume the burden of satisfying the court that the administrative decision is not reasonably supported by substantial evidence." 1 Texas Jurisprudence 2nd, Administrative Law, etc., § 48, p. 687.

Again, "A court is not confined to the record when reviewing the action of an agency, but may consider evidence properly introduced in court under the general rules of evidence." 1 Texas Jurisprudence 2nd, § 47, p. 686.

For an excellent resume of the situation, see 33 *Texas Law Review*, 717, "Some Aspects of the Texas 'Substantial Evidence' Rule," where the confusion existing as to the rights of litigants is well reviewed. Of the presumption favoring the administrative order it is said, p. 720, 721: "This 'presumption' is apparently irrebuttable, since the court will not inquire what evidence, if any, the agency considered." And of the availability of a judicial inquiry, the author notes the deficiencies: "The difficulty with this rationale is that an agency's error in ruling against a party *does* prejudice his rights, since after the agency has acted he finds it much more difficult to secure a fair determination of these rights; i.e., he must now go beyond convincing reasonable men that his is the better view, and must show that the order is not reasonably supported by substantial evidence." (emphasis the author's)

heretofore noted the remarks of a learned trial judge, trying a case under the "substantial evidence rule," of the burden of those attacking an order under that rule: "It is a peculiar thing that they have a burden which in ordinary parlance and in ordinary understanding of the English language *is an impossible burden*, but the Supreme Court has ruled it to be a *possible* burden by having established the rule itself ****." *T. & N. O. Railroad Co., et al. vs. Railroad Commission of Texas*, Tex. Sup. Ct., 155 Tex. 323, 286 S.W. 2d 112 at 123.

(b)

Limited Judicial Review Fails to Protect Constitutional Rights

Since these administrative proceedings were tainted, *ab initio*, with unfairness, so as to violate appellants' constitutional rights, the Commissioner's order was void, so that any subsequent judicial "review" could not breathe new life into that which was dead. Keyed to this is the proposition that "The essence of justice is largely procedural."[8] The defect can be harmless *only* where it is the court's duty "*to make an independent finding of the facts totally apart from the finding made by the adminstrative tribunal.*" 18 A. L.R. 2d 552, at 585. At no level, administrative or

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[8]Adminstrative Law Treatise (Davis), Vol. 1, § 7:20, p. 506, citing decisions of this Court.

"To experienced lawyers it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed construction of a statute **." *Speiser v. Randall*, 357 US 513, 520, 78 S. Ct. 1332, 2 L. ed. 2d 1460,

judicial, have appellants been afforded a full hearing, with all the facts publicly spread on the record, and an independent judgment thereon.

In our case the Supreme Court of Texas has not pitched its decision on the proposition that a trial under the substantial evidence rule cured the administrative proceedings; rather, it has condoned what was done at the administrative level, in the teeth, we think, of many rulings of this Court, holding such action unconstitutional. However, against the possible argument that a substantial evidence trial cured the administrative proceedings, we cite *Southern Railway Co. v. Commonwealth of Virginia*, 290 US 190, 198, 54 S. Ct. 148, 78 L. ed. 260, 266; *Ohio Bell Telephone Co. v. P.U.C. of Ohio*, 301 US 292, 300, 304, 57 S. Ct. 724, 81 L. ed. 1093, 1099, 1101; *West Ohio Gas Co. v. P.U.C. of Ohio*, 294 US 63, 68, 70, 71, 55 S. Ct. 316, 79 L. ed. 761, 768, 769; *Crowell v. Benson*, 285 US 22, 46, 52 S. Ct. 285, 76 L. ed. 598, 610[9]

1469, in considering a veterans' tax exemption procedure in California.

[9]These decisions may be compared with a case like *Pacific Live Stock Co. v. Lewis*, 241 US 440, 451, 36 S. Ct. 637, 60 L. ed. 1084, 1097, where the complaint that a board could wrongfully consider ex parte evidence and reports was disposed of by the Court by pointing out that the board acted only as a referee for the trial court, with all evidence laid before the board going before court "where it is to be accorded its proper weight and value. That the state, consistently with due process of law, may thus commit the preliminary proceedings to the board and the final hearing and adjudication to the court, is not debatable."

Also, *Washington ex. rel. Oregon R. & N. Co. v. Fairchild, et al.*, 224 US 510, 525, 32 S. Ct. 535, 56 L. ed. 863, 868, where, holding that the state statute afforded a "full hearing," yet observed that if the Oregon Company's contention were

In the *Southern Railway Company Case*, cited, involving appeal from the Virginia Supreme Court of an order of the corporation commission requiring the railroad to build a crossing without a hearing, the Court said of the state court's comment that equity would protect the railroad from arbitrary action (78 L. ed. at 266):

> "But by sanctioning the order directing the Railway to proceed it, in effect, approved action taken without a hearing, without evidence, without opportunity to know the basis therefor. ******.
>
> "The infirmities of the enactment are not relieved by an indefinite right of review in respect of some action spoken of as arbitrary. Before its property can be taken under the edict of an administrative officer the appellant is entitled to a fair hearing upon the fundamental facts. This has not been accorded."

In the *Ohio Bell Telephone Company Case*, when the Commission considered evidence outside the record, this Court condemned such action (81 L. ed. p. 1099): "This is not the fair hearing essential to due process," and added (at p. 1101): "What the Supreme Court of Ohio did was to take the word of the Commission as to the outcome of a secret investigation, and let it go at that." And this Court then fully restated the requirements of due process and fair play.

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true that the statute did not afford it a means of making a defense before the Commission, yet required it to attack the reasonableness of the order on such evidence as it might have been able to procure, then it would have had a valid complaint.

In the *West Ohio Gas Company Case*, where evidence outside the record was considered by the commission, the Court noted that in Ohio there was no provision for review "by a separate or independent suit," and even though this Court then observed that under that Ohio procedure the Supreme Court of Ohio could revise the record both as to law and the facts, nevertheless found this no cure, and held that "But the weakness of the case for the appellee is that the fundamentals of a fair hearing were not conceded to the company.", adding, "The Fourteenth Amendment condemns such methods and defeats them."

Crowell v. Benson stands clearly for the proposition that while a statute can lawfully make administrative action final, assuming proper notice, opportunity to be heard and support by evidence, it should be construed as not precluding "the court, in proceedings to set aside an order as not in accordance with law, from making its own examination and determination of facts whenever that is deemed to be necessary to enforce a constitutional right properly asserted."

(4)

Importance of the Question in the Field of Texas Administrative Law

In the twenty-five years since Rowan & Nichols[10]

[10] *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 310 US 573, 584, 60 S. Ct. 1021, 84 L. ed. 1368, 1374 (two cases, see also, 311 US 570, 61 S. Ct. 343, 85 L. ed. 358).

this Court's comment then, that the Texas decisions did not make clear whether the Texas courts could exercise an independent judgment as to what is "reasonable," presented a question which has now been foreclosed. The precepts of *Railroad Commission of Texas v. Shell Oil Co.* (1942) Tex. Sup. Ct., 139 Tex. 66, 161 S.W. 2d 1022, 1028 were: "The doctrine that the administrative agency should take the testimony and make the findings of fact, and that the findings should be binding upon the court, is foreign to the law of this State." This doctrine was destroyed in 1946 when the Texas Supreme Court, in *Trapp v. Shell Oil Company*, 145 Tex. 323, 198 S.W. 2d 424 at 429, approved this rule: "We think, however, that, generally speaking, the law contemplates that the Commission shall be left free to finally determine controverted issues of fact. *** The court, on appeal from the Commission's order, should not set aside an order *** unless such order is illegal, unreasonable, or arbitrary. Insofar as the fact findings upon which the order is based are concerned, the order is not illegal, unreasonable, or arbitrary if it is reasonably supported by substantial evidence. ****."

The Court will realize the importance of this appeal, in the entire field of administrative procedure in Texas, if the case is left to stand for the proposition that administrative hearings can be conducted in disregard of the time-honored standards of due process and fair play, and the orders thus born of unfairness and denial of due process, nevertheless be protected under the Texas "substantial evidence" rule. The judgment below is in direct conflict with the princi-

ples announced by this Court in many cases, in addition to those herein cited. The administrative process here followed (public hearing but a decision on secret evidence), and then protected by the application of the substantial evidence rule, has operated to entrap appellants, and deny them their rights. "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis v. Wechsler*, 263 US 22, 24, 44 S. Ct. 13, 68 L. ed. 143, 145. And if this can be done to appellants, it can be done to others, in similar circumstances, unless this Court decrees otherwise.

(5)

The State Court Judgment as Not Adequately Supported on Non-Federal Grounds

The Court of Civil Appeals made the proper decision: e.g., the Commissioner's action was illegal, *ergo*, there was no need to consider substantial evidence. (Appendix, p. xxviii)

The state grounds mentioned by the Court come within the rule of *Durley v. Mayo*, 351 US 277, 281, 76 S. Ct. 806, 100 L. ed. 1178, 1183: "*** 'But it is likewise well settled that if the independent (state) ground was not a substantial or sufficient one, "it will be presumed that the State court based its judgment on the law raising the Federal question, and this court

will then take jurisdiction." (cases cited).' " And it is clear, in our case, that the Supreme Court of Texas did not decide this case on non-federal grounds, "*** but rather rejected on the merits his federal constitutional claim." *Stroble v. State of California*, 343 US 181, 194, 72 S. Ct. 599, 96 L. ed. 872, 882, on certiorari to review a murder conviction, treating petitioner's contention of denial of due process because of publicity preventing a fair trial, as against the argument that he had failed to make a motion for change of venue. We take it also that appellants are entitled to invoke this Court's judgment, under the doctrine of *Staub v. Baxley*, 355 US 313, 319, 78 S. Ct. 277, 2 L. ed. 2d 302, 309, on appeal from a conviction for soliciting without a permit, on the question whether appellant's pleading had sufficiently raised the question of unconstitutionality:

> " 'It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support *** (for) if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided.' Ward v. Love County, 253 US 17, 22, 64 L ed 751, 758, 40 S Ct 419, and cases cited."

(A). The statement of the Court that the Commissioner "may rely upon information disclosed by the office records." (Appendix, p. xv):

The decisions of this Court, cited, supra, answer this statement. Based on such decisions as *U.S. v. B.*

& *O. S.W.R.R.*, supra, it is said, in the text of the article on "Official Notice," Gellhorn, 20 Texas Law Review, 131, at 137:

> "At the outset one may put aside, as being clearly beyond the proper sphere of official notice, the fruits of an *ex parte* investigation into the special facts of a pending case. ******. Yet facts which are peculiar to a particular case, that is, the 'litigation facts,' are not appropriately to be noticed. They must be established by evidence which, though it might in some instances be of an unconventional character, must nevertheless be brought into the record for testing and rebuttal by those who may deny its significance."

(B). The statement of the Court that since the statute "expressly authorized *** an independent investigation," etc., "respondents are charged with notice of the likelihood of such an investigation and report." And, the supplemental remarks, that respondents did not demand to see the report, and participated in the hearing without demanding to see the data collected. Also, the statement that there was no showing that there was anything secret about the report. (Appendix, pp. xvi, xvii):

First, the statute simply provides that the Commissioner "shall ascertain from the best sources at his command, and by such investigation as he may deem necessary ***" (Art. 881a-2, Vernon's Anno. Civ. Stat. of Texas). *On the other hand, the Rules of Procedure provided for a public hearing, and, presumably, a fair one.*

In *Ohio Bell Telephone Co. v. P.U.C. of Ohio*, 301 US 292, 306, 57 S. Ct. 724, 81 L. ed. 1093, on appeal from Ohio where the utility commission had acted on ex parte evidence, this Court said, of the claim of waiver, p. 1102:

> "The appellant has not estopped itself from objecting to the use of price trends gathered in its absence. ****.
>
> "****. What is certain in any event is this, that nothing in the course of the trial gave warning of the purpose of the Commission, while rejecting evidence of value in respect of exchanges under bond, to wander afield and fix the composite value of the system without reference to any evidence, upon proofs drawn from the clouds. As there was no warning of such a course, so also there was no consent to it. We do not presume acquiescence in the loss of fundamental rights."

And inasmuch as witness Crews, of American, with whom the investigator spent some two days, did not know that he proposed to give the Commissioner a confidential report, why should these appellants be charged with such notice? (S.F. 225).

There is nothing in the statute which would imply that the Commissioner would or could use a secret report. Rules being promulgated for a public hearing, at which all evidence for and against would be spread on the record, what better source of information could there be than this, *as compared to* the unconstitutional procedures of special investigations and secret reports? Moreover, this investigation was not even con-

tended to have been made under *this* statute, but rather, under a provision of the Penal Code, for it was that penal provision which the Assistant Attorney General specifically relied upon in claiming privilege and secrecy (S.F. 101-102).[11] Indeed, the Commissioner released this information at trial as being in the "public interest," again following this penal provision. Obviously that penal provision has applicability to *going concerns* only, and not proposed associations.

What the State has done is to seek protection under its police powers for violations of the Fourteenth Amendment. This cannot be done. "A claim that action is being taken under the police power of the state cannot justify disregard of constitutional inhibitions." *Panhandle Eastern Pipe Line Co. v. State Highway Com. of Kansas*, 294 US 613, 619, 55 S. Ct. 563, 79 L. ed. 1090, 1095.

That this is the position of appellees cannot be doubted, for their statements bear them out. From "Petitioners' Answer to Respondents' Reply," p. 6, we quote:

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[11] Art. 1136a-9, Vernon's Penal Code of Texas, reads in part: "Art. 1136a-9. Disclosures of Examiners—Penalty. The Banking Commissioner and any examiner, inspector, deputy, assistant or clerk, appointed or acting under the provisions of this Act, failing to keep secret any facts or information regarding *an association obtained in the course of an examination* or by reason of his official position, except when the public duty of such officer required him to report upon or take official action regarding the affairs *of the association so examined*, or who wilfully makes a false official report *** shall be removed from his position or office and shall be fined etc. ****"

"The basic statute here involved, Article 881a-2, obligates the Commissioner to 'ascertain from the best sources at his command and by such investigation as he may deem necessary.' Rules and Regulations which would limit the Commissioner's consideration to testimony offered at a hearing (which is Respondents' basic contention in this litigation, Reply, pp. 12-23, 28-44), or which would require him to make public his sources of information would obviously be inconsistent with Article 881a-2 and Article 1136a-9, V.A.P.C."

Second, as to secrecy of the report: The claim of the Commissioner that he had proceeded under authority of the Penal Code as for an examination; his admission that only he and his office personnel knew the contents of this secret report (S.F. 110); the undisputed testimony of witness Findlay, for appellants, that they had no knowledge of the report (S.F. 73); the Commissioner's attempt to keep the report out of evidence, and his claimed protection of the Penal Code provision; all these undisputed facts give no substance to the Supreme Court's conclusion that there was nothing secret about the report. We most certainly do not claim that the learned Supreme Court of Texas has attempted to avoid a decision of the federal grounds, rather, it has clearly decided these against appellants. However, we do feel that the Court's comment as to no secrecy is no more than *dictum*, and in any event, "It is settled that a state court may not avoid deciding federal questions and thus defeat the jurisdiction of this Court by putting forward non-federal grounds of decision which are without any fair or substantial support." *Wolfe v. North Carolina*, 364 US 177, 185,

80 S. Ct. 1482, 4 L. ed. 2d 1650, at 1657, the golf course trespass case.

Third, as to the intimation that appellants had waived their constitutional rights: Appellants were entitled to presume that the Commissioner would deal fairly with them, follow the rules, and make no decision on secret evidence. Many Texas decisions support this proposition: "**** the law presumes, until the contrary is shown, that every public officer will discharge the duties imposed upon him—in other words, that he will comply with the law." 34 Tex. Jur., Public Officers, § 81, p. 462.

Under Texas law there can be no waiver of rights without knowledge or notice, for there must be an intent to waive.[12]

The error of the Supreme Court of Texas here is that it has presumed that appellants waived their constitutional rights, when the law as to presumptions is diametrically opposed to any such proposition. As in *Smith v. United States*, 337 US 137, 150, 69 S. Ct. 1000, 93 L. ed. 1264, 1274, as to whether the accused had waived immunity from self-incrimination by answering certain questions, the Court said: "Waiver of constitutional rights, however, is not lightly to be inferred." And in *Johnson v. Zerbst, Warden, etc.*,

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[12] *White Motor Co. v. Mizell*, Tex. Civ. App., 334 S.W. 2d 828; *Loggins v. Gates*, Tex. Civ. App., 301 S.W. 2d 525, writ ref. n.r.e.; *Garner v. Texas State Board of Pharmacy*, Tex. Civ. App., 304 S.W. 2d 530, writ ref. n.r.e., and cases cited therein.

304 US 458, 464, 58 S. Ct. 1019, 82 L. ed. 1461, 1466:

> "*****. It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that 'we do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. ****."

To the same effect is *Emspak v. United States*, 349 US 190, 198, 75 S. Ct. 687, 99 L. ed. 997, 1005.

In short, the implication of waiver here is not unlike the holding by the state court of "voluntary payment" in *Ward v. Love County, Oklahoma*, 253 US 17, 22, 40 S. Ct. 419, 64 L. ed. 751 at 758. When such ground was used by the state court to defeat the Choctaw Indians' suit for refund of taxes, this Court looked at the record, and reached a contrary conclusion, holding "The right to the exemption was a Federal right, and was specially set up and claimed as such in the petition. Whether the right was denied, or not given due recognition, by the supreme court, is a question as to which the claimants were entitled to invoke our judgment, and this they have done in the appropriate way." We now ask the same consideration of the Court.

Finally, the local (state) grounds mentioned by the Supreme Court of Texas *after* deciding the federal questions are so inextricably enmeshed *with* the federal questions so as to require this Court to look to the record, under the rule of such cases as *Fiske v. Kansas*,

274 US 380, 385, 47 S. Ct. 655, 71 L. ed. 1108, at 1111 and *Norris v. Alabama*, 294 US 587, 590, 55 S. Ct. 579, 79 L. ed. 1074, 1077. In the *Fiske Case* the Court recognizing that it "will review the finding of facts by a state court where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it" and in the *Norris Case*, the Court holding (79 L. ed. 1077) that when a federal right had been set up and denied in the state courts, this Court would inquire into such action, and adding:

> "If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured."

(C) The Texas Supreme Court's treatment of the principles of *Service v. Dulles*, cited, supra, at p. 37: The Texas Court disposes of this case and its principles on the proposition that appellants do not direct the Court to any evidence in the record tending to show that "the Commissioner had so construed his authority to grant charters as being limited by a procedural rule requiring that all evidence be introduced at the administrative level" (Appendix, pp. xiv and xv).

First, this is clear error, factually. The Commissioner has admitted, under oath, in response to re-

quests for admissions that "one of the primary purposes" of the rules and regulations "is to afford a *public hearing* at which *all evidence*, for and against an application for a savings and loan application *will be presented*." (This Statement, supra, at p. 17, and Transcript, at p. 80, and S.F. p. 25)[11] Surely, the Commissioner is bound by his own sworn admission as to the applicability of the rules. Indeed, he announced at the hearing that anything further in behalf of the applicant would be by public hearing (S.F. 83, and Plf. Ex. 21, at p. 113). Also, Plf. Ex. 6-A, is his public announcement that "These rules and regulations, in conjunction with the Constitution and laws of Texas, govern the establishment of *** associations ***."

Second, this is error as a matter of law. Even if the Commissioner had not considered himself bound by the rules, this would not operate to exempt him from following them, for any other rule of law would permit administrative officials to escape prohibitions of the Constitution, the laws and the agency's rules simply by contending that they did not consider themselves bound by them. Whether the Commissioner was bound by these rules and the Constitution were ques-

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[11] The Texas Rules of Civil Procedure (as promulgated by the Supreme Court of Texas) provide, by Rule 169, for this method of discovery, to obtain admission from a party "of the truth of any relevant matters of fact," such admissions being "for the purpose of the pending action only." The Court has said that this rule, based on Federal Rule of Civil Procedure 36, 28 USCA, and "The primary purpose of the rule is to simplify trials by eliminating matters *about which there is no real controversy*." *Sanders v. Harder*, Tex. Sup. Ct. 227 S.W. 2d 206, at 208.

tions of law, and not questions to be answered on the basis of what the Commissioner thought. It is a cardinal principle that "Whether an administrative agency applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the agency and govern its action, *are appropriate questions for judicial decision.*" 42 Am. Jur., Public Admin. Law, § 210, p. 625.

The approach of the Supreme Court of Texas gave the Commissioner free rein to discriminate against these appellants and in favor of the appellee, American, by not applying the published rules for public hearing; and in all cases leaving him free to apply the rules, and thus afford *some* protection, or not apply them, and afford *others* no protection. Thus American is given immunity from the rules, i.e., the benefits derived by the Commissioner's failure to comply with them. This smacks of class legislation, prohibited by such cases as *Truax v. Corrigan*, 257 US 312, 333, 66 L. ed. 254, 263. And, further, the rule of that case, in considering an appeal attacking an injunction statute in Arizona, is here applicable (at p. 259):

> "In cases brought to this court from the state courts for review, on the ground that a Federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted Federal right has no basis in point of fact, or has been waived or lost, this court, as an incident of its

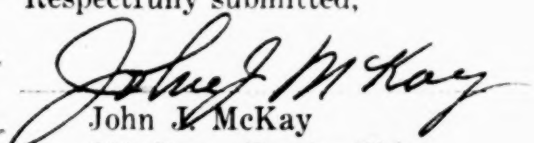
> power to determine whether a Federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here."

The Commissioner having unhesitatingly admitted the force and effect of the rules, we take it that this Court will, therefore, consider this fact, and the applicable law, to reach the conclusion that this local (state) ground is without substance.

CONCLUSION

It is submitted that the decision and judgment of the Supreme Court of Texas has effectively denied appellants their rights under the Due Process of Law and Equal Protection of the Laws Clauses of the Fourteenth Amendment, and has constituted a taking of their property contrary to these constitutional provisions. We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,



John J. McKay
703 Perry-Brooks Bldg.
Austin, Texas
Counsel for Appellants

Dated,
October 14, 1963.

PROOF OF SERVICE

I, John J. McKay, one of the attorneys for Brazosport Savings and Loan Association, Fort Bend Federal Savings and Loan Association, and Gulf Coast Savings and Loan Association, appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 16 day of October, 1963, I served copies of the foregoing Jurisdictional Statement and Appendix thereto on the several parties who are appellees herein, as follows:

On J. M. Falkner, Banking Commissioner of Texas, appellee, by delivery of a copy thereof at the office of said party's counsel of record, Waggoner Carr, Esq., Attorney General of Texas, State Supreme Court Building, Austin, Texas, to a clerk in said counsel's office.

On American Savings and Loan Association, and Jimmy Phillips, et al., directors of said Association, by delivery of a copy thereof at the office of said parties' counsel of record, Martin Harris, Esq., 1020 Brown Building, Austin, Texas, to a clerk in said counsel's office.

John J. McKay
703 Perry-Brooks Bldg.
Austin, Texas
Attorney for Appellants

APPENDIX

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IN THE SUPREME COURT OF TEXAS
AUSTIN

May 8, 1963

No. A-8874.

Jimmy Phillips et al.	)	
vs.	)	From Travis County.
Brazosport Savings &	)	Third Dist.
Loan Association et al.	)	

Motion of respondents for rehearing, filed in above numbered and entitled cause on April 4, 1963, having been duly considered by the Court, it is ordered that said motion be, and hereby is, overruled.

****

IN THE SUPREME COURT OF TEXAS
AUSTIN

* * * * * * *

March 20, 1963.

No. A-8874.

Jimmy Phillips et al.	)	
vs.	)	From Travis County,
Brazosport Savings &	)	Third Dist.
Loan Association et al.	)	

This cause came on to be heard on writ of error to the Court of Civil Appeals for the Third Supreme Judicial District, and the original transcript and transcript showing the proceedings in the Court of Civil Appeals

having been duly considered, because it is the opinion of the Court that there was error in the judgment of the Court of Civil Appeals, but no error in the judgment of the District Court, it is adjudged, ordered and decreed that the judgment of the Court of Civil Appeals be, and hereby is, reversed and set aside, and that the judgment of the District Court be, and hereby is, affirmed.

It is further ordered that respondents, Brazosport Savings & Loan Association, Fort Bend Federal Savings & Loan Association (Some times called Fort Bend Savings & Loan Association) and Gulf Coast Savings & Loan Association, and the surety on their appeal bond, National Surety Corporation, pay all costs in this cause expended and incurred in this Court and the Court of Civil Appeals; that petitioners, Jimmy Phillips, George G. Badge, J. P. Bryan, James F. Crews, James G. Dickson, Jerry T. Fauvion, Jack E. Reid, B. J. Roberts, H. D. Sherbrook, Belvin Stewart, E. C. Stockley, J. T. Suggs, American Savings & Loan Association—Lake Jackson, Texas, and J. M. Falkner, Banking Commissioner of Texas, have and recover of and from respondents, Brazsoport Savings & Loan Association et al. (above named), and surety, National Surety Corporation, the cost by them expended and incurred in said courts, and that this decision be certified to the District Court of Travis County, Texas, for observance.

IN THE SUPREME COURT OF TEXAS

NO. A-8874

(366 S.W. 2d 929)

JIMMY PHILLIPS, AMERICAN SAVINGS & LOAN ASSOCIATION, J. M. FALKNER, BANKING COMMISSIONER OF TEXAS, ET AL.	)	
PETITIONERS	)	From Travis County
V.	)	
BRAZOSPORT SAVINGS & LOAN ASSOCIATION, FORT BEND FEDERAL SAVINGS & LOAN ASSOCIATION, AND GULF SAVINGS & LOAN ASSOCIATION	)	Third District
RESPONDENTS	)	

This case involves the validity of an order of the Banking Commissioner granting a charter and certificate of authority to American Savings & Loan Association. Respondents—Brazosport Savings & Loan Association, Fort Bend Federal Savings & Loan Association and Gulf Savings & Loan Association—attacked the order in the district court; that court rendered judgment upholding the order of the Commissioner. The Court of Civil Appeals reversed and rendered judgment canceling the charter and certificate of authority of the American Savings & Loan Asso-

ciation. 353 S. W. 2d 78. The officers and directors of American Savings & Loan Association and the Banking Commissioner, J. M. Falkner, are petitioners here.

Respondents contended in the Court of Civil Appeals that the order was invalid on two main grounds: (I) Certain procedural defects rendered the order illegal and (II) the order was not supported by substantial evidence. The Court of Civil Appeals sustained respondents' first contention and held the order illegal, but did not pass on the contention that the order was not supported by substantial evidence. Respondents make both contentions in this court.

I. Procedural Matters

Respondents urge three procedural matters which they say deprive the Commissioner of authority to grant the charter: (A) one of the associates' taking the acknowledgments of the other associates' signatures on the articles of association, (B) failure of Commissioner to require petitioners to file supporting data with the articles of association as provided by Rule 2.1 of the Rules and Regulations for Building and Loan Associations of the Finance Commission of Texas, and (C) the Commissioner's considering an investigator's report which was not introduced at the administrative hearing.

(A) Acknowledgment

Respondents contend that the Commissioner was without jurisdiction to grant the charter because the

application and articles of association were not properly acknowledged as required by Article 881a-29[1] in that one of the members of the Association took the acknowledgment of the 51 other members who signed the articles. The articles of association filed with the Banking Commissioner by the petitioners were signed by 52 persons. One of those signing the articles, Elizabeth B. Bice, a notary public, took the acknowledgments of the 51 others signing the articles. Her own acknowledgment was taken by another notary not a member.

While this court has not passed on the question, it appears from other jurisdictions that when the statute requires that articles of incorporation be acknowledged, then a *valid* acknowledgment is a prerequisite to a statutory right to the granting of the charter. People v. Montecito Water Co., 32 Pac. 236, (California S. Ct.); People ex rel. Erie R. Co. v. Board of Railroad Commissioners et al., 93 N.Y.S. 584.

The general rule in this state and other jurisdictions is that one who is financially and beneficially interested in a transaction is disqualified to take an acknowledgment concerning the transaction. Brown v. Moore, 38 Tex. 646; Rothschild v. Dougher, 85 Tex.

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[1]"Any number of persons, not less than five (5), who are citizens of this state, desiring to incorporate a building and loan association may, by complying with the provisions of this Act and entering into articles of association, become a corporate body. Such articles of association shall be signed by the persons associating and acknowledged before some person authorized by the laws of this state to take acknowledgments to deeds, and shall set forth: * * * [lists information which articles must contain]"

332, 20 S. W. 142, 16 L. R. A. 719; Creosoted Wood Block Paving Company v. McKay, Tex. Civ. App., 211 S. W. 822; Gulf Production Company v. Continental Oil Company, 139 Tex. 183, 164 S. W. 2d 488; 1 Tex. Jur. 2d, pp. 389-390, § 38; see Comment, 14 B. L. Rev. 299 (1962).

However, we think that it was the purpose and intent of the Legislature in requiring that "such articles of association shall be signed by the persons associating and acknowledged before some person authorized by the laws of this state to take acknowledgments to deeds . . ." to assure the Commissioner that the signatures of the incorporators were genuine and to prevent fraud or undue influence. Respondents do not so much as suggest that the signatures were not genuine, or that there was bad faith, or fraud, or undue influence. We hold that the fact that one of the associates happened to be the notary who took the acknowledgments of the other 51 associates does not render invalid the charter granted pursuant thereto.

(B) Failure to File Supporting Data

Rule 2.1 provides as follows:

> "When articles of incorporation of a new association are presented to the Banking Commissioner for his approval, such articles shall be accompanied by the proposed By-Laws of the association and statements, exhibits, maps and other data properly verified, which shall be sufficiently detailed and comprehensive to enable the Commissioner to pass upon the proposed charter as to

(1) the character, responsibility and general fitness of the persons named in the articles; (2) whether the public convenience and advantage will be promoted by allowing such proposed association to be incorporated and engage in business, taking into consideration (a) that insurance of the accounts of the proposed association has been applied for and that such insurance will probably not be refused by the Federal Savings and Loan Insurance Corporation, (b) that such proposed association will have and maintain independent quarters with a ground-floor location or its equivalent, (c) that such proposed association will have qualified, full-time management, and (d) the adequacy of the initial capital and surplus of the proposed association; and (3) whether the population of the neighborhood of such place and in the surrounding country affords a reasonable promise of adequate support for the proposed association."

The Commissioner testified at the trial that it has been his custom not to require the filing of this data if there was to be a hearing. Whether there was to be a hearing depended upon whether or not there were protestants who wished to challenge the granting of the charter. (Rule 2.3 of the Rules and Regulations) Since there was to be a hearing petitioners did not file accompanying data.

Respondents contend that Rule 2.1 requiring the filing of this data is mandatory and jurisdictional and that an order granting a charter when no data has been filed is void.

We overrule this contention. The requirements of this rule are not jurisdictional.

Article 881a-2, from which the Commissioner gets his authority to grant charters, provides as follows:

> "When any persons shall file a proposed charter or articles of agreement as is elsewhere herein provided, if it appears to the satisfaction of the Banking Commissioner of Texas that the minimum capital required has been paid in cash into the treasury of the association upon subscriptions for shares, the Banking Commissioner of Texas shall ascertain from the best sources at his command, and by such investigation as he may deem necessary, the expense of such investigation to be paid by the incorporators, whether the character, responsibility and general fitness of the persons named in the articles of incorporation are such as to command confidence and warrant belief that the business of the proposed building and loan association will be honestly and efficiently conducted in accordance with the intent and purpose of this Act, and whether the public convenience and advantage will be promoted by allowing such proposed building and loan association to be incorporated and engaged in business, and whether the population of the neighborhood of such place and in the surrounding country affords a reasonable promise of adequate support for the proposed building and loan association. If it shall be satisfied concerning the several matters specified, the Banking Commissioner of Texas shall issue under his official seal a certificate reciting in substance the filing in its office of the articles of incorporation; that such articles conform to all requirements of the law, and that they have been approved, whereupon the persons named in the articles of association, their associates and successors, shall become a corporate body * * *.

The statutory mandate is that the Commissioner

must find (1) that the character of the incorporators is satisfactory, (2) that the public convenience and advantage will be served by the granting of the charter and (3) that the population will support a building and loan association. The statute gives the Commissioner the power to "ascertain [these facts] from the best sources at his command, and by such investigation as he may deem necessary." The statute nowhere requires that the Commissioner require the filing of this supporting data at the time of filing the articles of association. This rule is one which the Finance Commission has enacted for the convenience of the Banking Commissioner. The filing of this data merely provides the Banking Commissioner with another source of information. Nothing in the rule imports that its purpose is to acquaint a protestant with the evidence which an applicant is relying on. The Commissioner testified at the trial that his practice has been not to require the filing of the data when there is to be a hearing. He relies on the hearing and other sources of data necessary to a determination as to population, character, and public convenience and advantage. This interpretation of the rule is in harmony with the statute, since the statute gives him discretion to gather data from the best sources at his command.

Respondents contend that they have been deprived of their constitutional rights by the failure of petitioners to file the data, in that they were not able to properly prepare for the hearing, not knowing what evidence was to be offered by the applicants. This is untenable. In the first place, the rule does not provide

that the data be filed before the hearing, but upon presentation to the Commissioner for approval. This could well mean *at the hearing.* In the second place, we can find no unfairness in the Commissioner's not requiring the filing of such data before the hearing was held because the respondents knew exactly who the incorporators were, they knew the town in which the association was to be located, and what the factual issues would be, since they are set out by the statute.

Respondents had ample opportunity after notice to prepare for the hearing. They knew that in order for the Commissioner to grant the charter he would have to be satisfied as to the character of the incorporators, as to the public advantage and convenience for granting the charter, and that the population showed promise of sufficient support for the association. If one or more of the conditions could not be met, respondents had every opportunity of showing the necessary facts to the Commissioner.

Under the circumstances we find no constitutional rights of respondents to be violated by the failure of the Commissioner to require petitioners to file supporting data before the hearing.

The rule is manifestly for the purpose of aiding the Commissioner in performing his duty and not for the purpose of apprising a protestant of evidence to be introduced at a hearing. He may disregard it without infringing upon the rights of the respondents. 42 Am. Jur. 448, Public Administrative Law, § 115.

(C) Evidence not Presented at the Hearing

As their third ground of illegality respondents contend that the Commissioner's relying on certain evidence not introduced at the administrative hearing deprives them of due process of law.

At the hearing J. F. Crews—one of the organizers of American Savings & Loan Association of Lake Jackson, Texas—appeared and testified. Protestants also appeared and gave evidence.

Before the hearing the Commissioner had sent out one Benson, a member of his staff, to investigate conditions in the Lake Jackson area, and Benson filed his report. It is this report which was never introduced at the hearing that respondents complain of most.

Early in the administrative hearing the Commissioner proposed that there be another hearing at a later date, and the parties agreed, but after all parties were heard, he said that he did not see any need for another hearing; thereupon, the hearing came to a close.

In the first Brazosport case we held that respondents have a vested property right in their franchies and that due process of law entitled them to challenge the granting of a new charter and to get judicial review under the substantial evidence rule. Brazosport Savings & Loan Association v. American Savings & Loan Association, 161 Tex. 543, 342 S. W. 2d 747 (1961).

Respondents contend that the Commissioner's rely-

ing on evidence not introduced at the hearing deprives them of due process of law and that judicial review under the substantial evidence rule does not cure that want of due process.

In support of their contention that the 14th Amendment due process clause guarantees them the right to have all the evidence relied on by the Commissioner brought out at the administrative hearing, respondents cite Interstate Commerce Commission v. Louisville and Nashville Ry., 227 U. S. 88, 57 L. Ed. 431; United States v. Baltimore and Ohio Southwestern Ry. Co., 226 U. S. 14, 57 L. Ed. 104; Southern Stevedoring Co. v. Voris, 190 F. 2d 275 (5th Cir. 1951); Trustees of Saratoga Springs v. Saratoga Gas, Electric Light and Power Co., 83 N. E. 693, (N.Y. Court of Appeals); Wichita R. & Light Co. v. Court of Industrial Relations, 214 P. 797 (Kan.); American Employers Insurance Co. v. Commissioner of Insurance, 10 N. E. 2d 76 (Mass.); Pennsylvania R. Co. v. N. J. State Aviation Commission, 65 A. 2d 61 (N.J.); Dembeck v. Bethlehem Shipbuilding Co., 170 A. 158 (Md.); and Coleman v. Watts, 81 So. 2d 650 (Fla.).

We have examined these cases and have concluded that except for Coleman v. Watts, supra, they fall into two categories: (1) cases which state the proposition favorable to respondents by way of dictum; the two United States Supreme Court cases represent this category; and (2) cases which are distinguishable from the case at bar because the applicable state or federal statute either expressly or by implication required a full hearing with all the evidence considered by the administrative official "spread on the record"

of the administrative hearing. In some of these cases the statute expressly required a full judicial type hearing which by definition includes the right to have all evidence relied on introduced at that hearing. In other cases in the second category, the statute expressly limited judicial review to the record made at the hearing.

As we have pointed out, Article 881a does not require a hearing of any kind. The rules, however, provide for a hearing in certain instances, but do not provide any procedure. This brings us to a consideration of Coleman v. Watts, supra, which involved a Florida statute somewhat similar to Article 881a in that there were no procedural requirements prescribed by the Legislature. In that case the State Board of Bar Examiners operating under statutory authority denied an applicant a license on the ground of moral unfitness without disclosing at a hearing the specific charges against him or the evidence of his unfitness relied on by the examiners. The Supreme Court of Florida held this to be a violation of procedural due process and reversed the Board order denying the license.

We think the fact that the applicant in that case was accused of moral unfitness sufficiently distinguishes that case from the case at bar.

Aside from the constitutional requirements, respondents also cite Service v. Dulles, 354 U. S. 363, 1 L. Ed. 2d 1403, 77 S. Ct. 1152. This was a case in which the Secretary of State discharged a foreign service officer on the recommendation of the Loyalty Re-

view Board without himself reading the evidence and without making an independent determination. The Secretary of State discharged this officer under the authority of the "McCarren Rider" to the Appropriations Act for 1947. 65 Stat. 581. The "McCarren Rider" gives the Secretary of State authority to discharge employees "in his absolute discretion . . . whenever he shall deem such termination necessary or advisable in the interests of the United States." The McCarren Rider gave the Secretary additional authority to discharge free of the procedural regulations imposed on him under the Loyalty Security Program. But the Supreme Court held that, while he need not have done so, the Secretary of State had limited his own authority by those rules and regulations and that he must abide by them. The rules required him to examine the evidence of the employees' disloyalty and to make an independent determination. Failure to do this rendered the discharge void.

Respondents seek to invoke this principle in the instant case, but they do not direct us to any evidence in the record tending to show that the Commissioner had so construed his authority to grant charters as being limited by a procedural rule requiring that all evidence be introduced at the administrative hearing.

In any event, we think that respondents have not been deprived of their procedural rights in this case. It has repeatedly been held by the Texas decisions that the Commissioner is not confined to the evidence actually brought out at the hearing, but may rely upon information disclosed by the office records. Alamo

Express v. Union City Transfer, 158 Tex. 234, 309 S. W. 2d 815 (1958); Railroad Commission v. McDonald, 90 S. W. 2d 581 (Tex. Civ. App. 1936), no writ history; North East Texas Motor Lines, Inc. v. Texas & Pacific Motor Transport Co., 159 S. W. 2d 926 (Tex. Civ. App. 1941) no writ history; Texas Industrial Traffic League v. Railroad Commission of Texas, 255 S. W. 2d 903, (Tex. Civ. App. 1953), ref'd n.r.e.

Since the statute expressly authorizes the Commissioner to make an independent investigation and to rely on the results thereof in making his determination, respondents are charged with notice of the likelihood of such an investigation and report. Moreover, before the hearing, investigator Benson interviewed officers of two of the protesting building and loan associations, thus putting them on actual notice that the Commissioner was exercising his authority to make an independent investigation. Yet the respondents participated in the administrative hearing before the Commissioner without once demanding to see the data collected by the investigator. Toward the end of the hearing the Commissioner stated that he did not see any need for another hearing. In reply to this respondents' attorney said, ". . . As I understand it, if the applicant is going to offer anything further, it will be by public hearing." And the Commissioner answered, "Sure, if they have anything else to offer, we will get to it."

Thus respondents demanded that the Commissioner continue the hearings in the event that petitioners offered more evidence, but they never asked to have the

investigator's report brought out at a public hearing. The Commissioner has never refused to produce the report at a public hearing.

There is no showing that there was anything secret about this report or that it was not available to the parties at all times for the mere asking. Under these circumstances we find that no due process was denied respondents by the failure of the Commissioner to introduce the investigator's report at the hearing.

II. Was there Substantial Evidence?

While respondents mainly rely on the argument that the Commissioner had no right to rely on incompetent evidence (evidence not presented at the administrative hearing), they do have counter points of error by means of which they argue that the holding of the Court of Civil Appeals is correct because there was not substantial evidence on which the Commissioner could base his decision; thus, it becomes our duty to review the evidence available to the Commissioner at the time he granted the order to determine whether or not that order may stand.

Review under the substantial evidence rule entails the following principles: The order of the Commissioner is presumed to be valid. The courts may not substitute their discretion for that delegated to the Commissioner by the Legislature; thus, the only question before the trial court is whether the Commissioner's decision was arbitrary and made without regard

to facts. Railroad Commission v. Shell Oil Co., 139 Tex. 66, 161 S. W. 2d 1022 (1942); Alamo Express v. Union City Transfer, 158 Tex. 234, 309 S. W. 2d 815 (1958); Thomas v. Stanolind Oil & Gas Co., 145 Tex. 270, 198 S. W. 2d 420 (1946). The test of whether an order is supported by substantial evidence is stated in Railroad Commission v. Shell Oil Co., supra, at 1029:

> ". . . where the order of the agency under attack involves the exercise of the sound judgment and discretion of the agency in a matter committed to it by the Legislature, the court will sustain the order if the action of the agency in reaching such conclusion is reasonably supported by substantial evidence. This does not mean that a mere scintilla of evidence will suffice, nor does it mean that the court is bound to select the testimony of one side, with absolute blindness to that introduced by the other. After all, the court is to render justice in the case. The record is to be considered as a whole and it is for the court to determine what constitutes substantial evidence. The court is not to substitute its discretion for that committed to the agency by the Legislature, but is to sustain the agency if it is reasonably supported by substantial evidence before the court. If the evidence as a whole is such that reasonable minds could not have reached the conclusion that the agency must have reached in order to justify its action, then the order must be set aside."[2]

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[2]This statement is quoted in Trapp v. Shell Oil Co., 145 Tex. 323, 198 S. W. 2d 424, and in Alamo Express v. Union City Transfer, supra. For another statement of the rule see Shupee v. Railroad Commission, 123 Tex. 521, 73 S. W. 2d 505.

Under the presumption of validity, the evidence which the court may consider includes proof made at the trial of facts in existence at the time the Commissioner entered his order, whether the Commissioner is shown to have been aware of those facts or not. Cook Drilling Co. v. Gulf Oil Corporation, 139 Tex. 80, 161 S. W. 2d 1035 (1942); Railroad Commission v. Shell Oil Co., supra; Alamo Express v. Union Transfer, supra.

Summary of the Evidence

The character, responsibility and general fitness of persons named in the articles of association have not been questioned.

As to public convenience and advantage, the Finance Commission has in Rule 2.1 announced four criteria: (a) Insurance of accounts—The record includes a copy of a letter from Federal Home Loan Bank of Little Rock acknowledging receipt by it of an application for insurance prior to the granting of the charter. This letter refers to accompanying forms for application of insurance to be returned after the charter is granted. Respondents do not show us anything in the record tending to rebut the application for insurance or tending to show that it will not be granted; thus, they have not met the burden of proving that there was no substantial evidence to support that finding.

(b) Independent ground floor quarters—Crews testified at the trial that the association had leased 900 square feet of independent ground floor office space in

downtown Lake Jackson and had done so before the Commissioner granted the charter. This information was available to the Commissioner at the time he granted the charter. Again, respondents fail to direct us to evidence in the statement of facts tending to refute that this was a fact at the time the Commissioner entered his order. They have failed to meet their burden of proof in this respect.

(c) Full-time management—Crews testified at the trial that B. J. Roberts had been selected to be manager and that the Commissioner had been so informed before he granted the charter. Crews also testified as to Roberts' business background and qualifications. Respondents do not rebut this testimony; they merely point to the Commissioner's statement that while he regarded qualified management as the most important single factor, he did not investigate Roberts personally, leaving that to his investigator Benson.

(d) Adequacy of initial capital—Crews testified that paid in capital was $140,000. This data was made available to the Commissioner as early as the date of the hearing. Respondents do not have evidence in the record rebutting this.

On the question of whether or not the population of the area to be served by the proposed building and loan association promised adequate support, Crews testified from a report prepared by the association; this report gives a rather impressive mass of data concerning economic conditions in and around Lake Jackson. Crews testified at the trial that the report contained facts

which were in existence at the time the Commissioner granted the charter. Some examples of that data will be sufficient for our purposes:

Brazoria County was growing faster than neighboring counties due to increased industrial activity. Lake Jackson's population grew from almost 3,000 in 1950 to 10,000 in 1957. Residential building permits were increasing rapidly. Dow Chemical, one of the two main industries in the area, employed most of Lake Jackson residents. Property valuations in Lake Jackson increased 12 times during the period 1944-1958. Savings during the period 1954-1958 increased some sixfold.

Benson's field report, made for the Commissioner, was introduced at the trial and includes the following data: Estimated population of the area to be served by the proposed building and loan association was 32,000. Lake Jackson is a "[m]odern city, built and incorporated in recent years. Ninety per cent of [its] inhabitants [are] employed by Dow Chemical, Freeport, nine miles distant." The population trend is "upward." Ninety-eight per cent of the homes are occupied by owners. Ninety-eight per cent of the dwellings were single family. The average selling price for single family dwellings was $15,000. Forty per cent of the residentially zoned property was undeveloped or vacant. Dow Chemical Company was continually expanding. Freeport harbor was being expanded. Two industries employ 5,000 workers and their payrolls are $28,000,000. Proposed industrial expansion of the area is likely to cause rapid popula-

tion increase in the area. There are four competing building and loan associations in the area, none in Lake Jackson itself.

Benson's report concluded with a statement that he believed that the character, responsibility, and general fitness of the persons named in the articles of association would "command confidence and warrant a belief that the building and loan association would be honestly and efficiently operated."

Respondents do not seriously attempt to rebut this data; their argument has consistently been that there were already enough building and loan associations in the area and that to charter one more would spread the business too thin, cause those building and loan associations in existence to operate at a loss and thereby detract from the public convenience and advantage.

For example, they testify that Brazosport Savings & Loan Association is located in Freeport, just eight miles from Lake Jackson, and that there are good, well travelled roads connecting these cities. There is similar testimony as to a number of other building and loan associations in the area. They also testified that there was active competition for the Lake Jackson business.

Respondents rely heavily on testimony of officers from other building and loan associations tending to show that business generally has been slow and that applications for loans have likewise been off. Respondents have testimony that two newly formed

building and loan associations are operating at a loss. The Commissioner testified that new associations were not expected to make money in the early years of their existence.

The decision as to the advisability of permitting another building and loan association to operate in the area calls for the exercise of discretion on the part of the Commissioner. The mere fact that there are a number of associations serving Lake Jackson does not preclude the Commissioner from finding that the public convenience and advantage would be served by having a building and loan association located in the town of Lake Jackson.

We hold that the Commissioner's order granting the charter is reasonably supported by substantial evidence; therefore, it is not arbitrary.

The judgment of the Court of Civil Appeals is accordingly reversed and the judgment of the trial court affirmed.

Robert W. Hamilton
Associate Justice

RWH/p
Opinion delivered:
Mar 20 1963

JUDGMENT RENDERED JANUARY 3, 1962

BRAZOSPORT SAVINGS AND LOAN ASSOCIATION

VS. NO. 10,943

JIMMY PHILLIPS ET AL.

OPINION BY ARCHER, CHIEF JUSTICE

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THIS CAUSE came on to be heard on the transcript of the record and same being inspected, because it is the opinion of the Court that there was error in the judgment, IT IS THEREFORE considered, adjudged and ordered that the judgment of the trial court be and same is hereby reversed and judgment rendered cancelling the charter and certificate of authority issued to American Savings & Loan Association and enjoining the transaction of business thereunder. It is FURTHER ordered that the appellees Jimmy Phillips, George G. Badge, J. P. Bryan, James F. Crews, James G. Dickson, Jerry T. Fauvion, Jack E. Reid, B. J. Roberts, H. D. Sherbrook, Belvin Stewart, E. C. Stokley and J. T. Suggs, and American Savings & Loan Association—Lake Jackson, Texas, and J. M. Falkner, Banking Commissioner of the State of Texas pay all costs in this behalf expended, both in this Court and the Court below and that this decision be certified below for observance.

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IN THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS,

AT AUSTIN

NO. 10,943

(353 S.W. 2d 58)

BRAZOSPORT SAVINGS & LOAN ASSOCIATION ET AL,

APPELLANTS

vs.

JIMMY PHILLIPS ET AL, APPELLEES

FROM DISTRICT COURT OF TRAVIS COUNTY, 126TH JUDICIAL DISTRICT, NO. 113,075, HONORABLE JACK ROBERTS, JUDGE.

This is an appeal from a judgment of the District Court of Travis County, Texas, denying appellants any relief on their petition for a judgment (1) declaring the action of the Banking Commissioner in granting a charter and certificate of authority to American Savings and Loan Association to be void, (2) permanently enjoining the individual defendants from doing business under such authority and the Commissioner from permitting them to engage in a savings and loan business, and (3) in the alternative, for a declaratory judgment declaring the action of the Commissioner to be void.

The subject matter of this litigation has been before

this Court at a prior date, in Brazosport Savings and Loan Association v. Phillips, 326 S.W. 2d 567. The Supreme Court granted a writ of error and reversed the judgment of this Court, and its opinion is found in Tex. , 342 S.W. 2d 747. The Court there held:

> "In accordance with prior decisions of this and other courts with which we agree, we believe that petitioners possess a valuable and vested property right in their franchises. Petitioners' allegations of fact that this right has been infringed upon by the action of the Commissioner must be taken as true in view of the procedural status of the case. Therefore, we hold that petitioners are entitled to an opportunity to prove their allegations that the Commissioner's action was illegal or without support in substantial evidence, and to appropriate relief if this be proved. Such an opportunity is afforded to petitioners by the due process clauses of the Constitution of this state and of the United States. Vernon's Ann. St. Const. Art. I, Sec. 19, U.S.C.A. Const. Amend. 14."

The case was tried and the judgment hereinabove was rendered and the case is before this Court on appeal.

The appeal is founded on 13 points assigned as error in the trial of the case and are that the Court erred in upholding the validity of the charter and certificate of American, because the Commissioner acted in violation of the rules and applicable law by relying on ex parte evidence and such conduct was arbitrary, capricious, unreasonable and unlawful; that the action of the Commissioner was based on secret and ex parte

evidence; that the application and articles of American filed with the Commissioner were not properly verified and were contrary to the provisions of Art. 881a-29, V.A.C.S. Sec. 2.1 of the Rules and the Commissioner's jurisdiction was never properly invoked; that the application on behalf of American failed to comply with the rules of the Building and Loan Section of the Finance Commission of Texas and the Banking Commissioner because the same were not accompanied by the required statements, exhibits, maps and other data, properly verified in sufficient detail to enable the Commissioner to pass on the proposed charter; that the manner in which the Commissioner accepted and filed the application and substitute application of American and granted the same constituted arbitrary action and a denial to appellants of due process; because the Commissioner did not give proper consideration to the competitive and damaging effect upon existing associations; that the granting of the application was in violation of Section 2.4 of the departmental rules requiring the Commissioner to file a written memorandum of his reasons for granting the charter; in construing Article 881a and the rules as authorizing the Commissioner to grant the charter because appellants were not afforded due process; that the Commissioner acted upon insufficient evidence or competent evidence in granting the charter; in upholding the action of the Commissioner in considering evidence heard in other proceedings and in considering evidence by witness Crews in testifying from D. Ex. 2 captioned "A Survey Report Prepared for Federal Home Loan Bank, etc." because such constituted hearsay testimony; and finally, in admitting in evidence

P. Ex. 27, a Field Investigation Report, such being hearsay.

The first five points are grouped together and briefed as such.

The prime question or questions to be determined under the Supreme Court's judgment is whether the Commissioner's action in granting the charter was illegal or without support in substantial evidence. If the action was illegal we need go no further, and we shall determine this question first. The burden was on appellants to prove that the Commissioner's action was illegal or that the Commissioner did not acquire jurisdiction to hear the application.

Rules and Regulations for Building and Loan Associations had been promulgated by the Building and Loan Section of the Finance Commission of Texas and the Banking Commissioner of Texas and were in effect, one of which reads as follows:

"Chapter 2. **New Charter Applications**

"2.1 When articles of incorporation of a new association are presented to the Banking Commissioner for his approval, such articles shall be accompanied by the proposed By-Laws of the association and statements, exhibits, maps and other data, properly verified, which shall be sufficiently detailed and comprehensive to enable the Commissioner to pass upon the proposed charter as to (1) the character, responsibility and general fitness of the persons named in the articles; (2) whether the public convenience and advantage

will be promoted by allowing such proposed association to be incorporated and engage in business, taking into consideration (a) that insurance of the accounts of the proposed association has been applied for and that such insurance will probably not be refused by the Federal Savings and Loan Insurance Corporation, (b) that such proposed association will have and maintain independent quarters with a ground-floor location or its equivalent, (c) that such proposed association will have qualified, ful--time management, and (d) the adequacy of the initial capital and surplus of the proposed association; and (3) whether the population of the neighborhood of such place and in the surrounding country affords a reasonable promise of adequate support for the proposed association."

On September 26, 1958 the individual defendants filed with the Commissioner certain Articles of Association and Application for Charter for American Savings and Loan Association—Lake Jackson, Texas, which was received by the Commissioner and held by him without fixing a hearing thereon within ten days, as required by Rule 2.1. Thereafter the said defendants superseded and amended their Articles and Application by instruments dated October 27, 1958, and filed these instruments with the Commissioner on or about October 31, 1958.

This amended application was not accompanied with supporting data as provided by the rule, and it is from approval of this application that the appeal is taken.

The hearing was had on December 15, 1958 and was attended by appellants as adversaries and protested.

As is presented in appellants' first point of error, appellants contend that the charter and certificate of American was granted in an adversary proceeding upon the strength of secret and ex parte evidence, in violation of departmental rules and applicable law, and was arbitrary, capricious, unreasonable and unlawful; by further assignment appellants say that the said application and articles of American filed were not properly verified and the jurisdiction of the Commissioner was never properly invoked and further that the application and articles were not accompanied by the required statements, exhibits, maps and other data properly verified, sufficiently detailed and comprehensive to enable the Commissioner to pass upon the proposed charter.

The amended application for a charter was not accompanied with nor was there filed with it such supporting data, verified or otherwise as required by the rule, consequently protestants were deprived of reasonable opportunity to know of the claims, allegations and proposed proof of applicants until the public hearing began, and were denied a fair and reasonable opportunity to prepare to meet the claims of applicants.

The application and articles filed with the Commissioner contained a jurat affixed thereto, executed by Elizabeth B. Bice, a notary public for Brazoria County, Texas, who is shown to be one of the incorporators of the association and a stockholder and as such is interested in the charter and the certificate sought.

In response to request for admissions the Commissioner admitted:

"(14) Admits that at the time the application and articles dated October 27, 1958, were presented to me on October 31, 1958, same were not accompanied by any statements, exhibits, maps and other data, properly verified.

"(15) Admits that at the time the application and articles dated October 27, 1958, were presented to me on October 31, 1958, same were not accompanied by any data sufficiently detailed and comprehensive to enable me, as Commissioner, to pass upon the proposed charter as to the matters set forth in item (1), Item (2), (2) (a), (2) (b), (2) (c) and (2) (d), and Item (3) of Section 2.1 of the Rules and Regulations appearing as Exhibit A attached to the request for Admissions, except that data and information pertaining to the matters set forth in Section 2.1 of the Rules and Regulations are included in the Application and Articles of Association."

It was admitted by the Commissioner that:

"(16) Admits that one of the primary purposes of the Rules and Regulations of January 29, 1958, is to afford a public hearing at which all evidence for and against an application for a savings and loan application will be presented.

"(22) Admits that prior to my action in granting approval of application and articles for American Savings & Loan Association the Proponents thereof did not at any time submit to me any verified (by acknowledgment or affidavit) statements, exhibits, maps and other data pertaining to Elements (1), (2) and (3) prescribed in Rule 2.1."

In the opinion of the Supreme Court, Tex. , 342 S.W. 2d 747, the Court held:

> "The rules and regulations for building and loan associations, as set forth in Article 881a-2, V.A.C.S., require that applications and articles be accompanied by certain data, properly verified and sufficiently detailed and comprehensive, to enable the Commissioner to pass upon a proposed charter. By the same article the Commissioner is charged with the duty of determining the character and fitness of the incorporators, and ascertaining 'whether the public convenience and advantage will be promoted by allowing such proposed building and loan association to be incorporated and engaged in business, and whether the population in the neighborhood of such place and in the surrounding country affords a reasonable promise of adequate support for the proposed building and loan association.'"

Basing our opinion on the record as a whole and the judgment of the Supreme Court, we are of the opinion that the action of the Commissioner in holding the hearing under the circumstances and in granting the charter and certificate to American was illegal.

The judgment of the Trial Court is reversed and judgment is here rendered cancelling the charter and certificate of authority issued to American Savings and Loan Association, and enjoining the transaction of business thereunder.

Roy C. Archer, Chief Justice

Reversed and Rendered.
Filed: January 3, 1962.
Richards, A. J. not sitting.

NO. 113,057

BRAZOSPORT SAVINGS AND LOAN ASSOCIATION, FORT BEND FEDERAL SAVINGS AND LOAN ASSOCIATION, GULF COAST SAVINGS AND LOAN ASSOCIATION, ET AL, Plaintiffs	)	IN THE 126TH DISTRICT COURT
V.	)	
JIMMY PHILLIPS, J. T. SUGGS, J. P. BRYAN, JAMES F. CREWS, ET AL, Defendants	)	TRAVIS COUNTY, TEXAS

JUDGMENT OF THE COURT

ON THE 16th day of May, 1961, in the above entitled and numbered cause, wherein Brazosport Savings and Loan Association, Fort Bend Savings and Loan Association, and Gulf Coast Savings and Loan Association are plaintiffs and Jimmy Phillips, George G. Badge, J. P. Bryan, James F. Crews, James G. Dickson, Jerry T. Fauvion, Jack E. Reid, B. J. Roberts, H. D. Sherbrook, Belvin Stewart, E. C. Stokley and J. T. Suggs, and American Savings and Loan Association—Lake Jackson, Texas, and J. M. Falkner, the Banking Commissioner of the State of Texas, are defendants, came the parties in person and by their attorneys; and

The defendants Jimmy Phillips, George G. Badge, J. P. Bryan, James F. Crews, James G. Dickson, Jerry

T. Fauvion, Jack E. Reid, B. J. Roberts, H. D. Sherbrook, Belvin Stewart, E. C. Stokley, J. T. Suggs and the American Savings and Loan Association—Lake Jackson, Texas, having, pursuant to Rule 174(b), Texas Rules of Civil Procedure, brought to the attention of this Court their Motion to Sever the separate claim alleged by the plaintiffs in subparagraph (3) (a), (b), (c), (d), (e), (f), (g), (h), and (i) of paragraph XII of Plaintiffs' Second Amended Original Petition and it appearing to the Court that said cause of action as therein alleged should be separately tried because such separate trial of the claims therein alleged will expedite the determination of the issues in the original cause of action which was by the Supreme Court remanded to this Court for trial on the merits and will avoid delay, inconvenience and expense to these defendants: and it further appearing that the allegations in said paragraphs constitute an attempt to allege a new, separate and distinct cause of action exclusively against defendant J. M. Falkner, Banking Commissioner of Texas, wholly separate and apart from the original cause of action alleged in Plaintiffs' First Amended Original Petition against both the Banking Commissioner and said other defendants;

It is, accordingly, ORDERED, ADJUDGED and DECREED that the cause of action alleged by plaintiffs in paragraph XII of Plaintiff's Second Amended Original Petition be severed from this cause of action and such severance suit shall proceed under the style and number of a new cause of action; and

Thereupon, came the parties in person and by their attorneys and submitted the matters in controversy

to the Court for trial on the merits without intervention of a jury, and the pleadings, the evidence, and the argument of counsel having been heard and fully understood, and the Court having determined all matters of fact and law, it is the opinion of the Court that the law and facts are with the defendants;

It is, accordingly, ORDERED, ADJUDGED and DECREED that the plaintiffs take nothing by their suit; that all relief prayed for by plaintiffs is hereby denied; that all court costs be assessed against plaintiffs, and defendants go hence without day; to all of which the plaintiffs in open Court duly excepted and gave notice of appeal to The Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin.

ENTERED this the 12th day of June, 1961.

Jack Roberts
JUDGE of the 126th District Court

APPROVED AS TO FORM:

WILL WILSON, ATTORNEY GENERAL
OF THE STATE OF TEXAS

By C. K. Richards
Assistant Attorney General
Capitol Station
Austin, Texas

CLARK, THOMAS, HARRIS, DENIUS
& WINTERS

By Martin Harris
1020 Brown Building
Austin, Texas

ATTORNEYS FOR JIMMY PHILLIPS, ET AL

McKAY & AVERY

By John J. McKay
703 Perry Brooks Bldg.
Austin, Texas

ATTORNEYS FOR BRAZOSPORT SAVINGS AND LOAN ASSOCIATION

IN THE SUPREME COURT OF TEXAS

NO. A-7521

(342 S.W. 2d 747)

BRAZOSPORT SAVINGS AND LOAN ASSOCIATION, FORT BEND FEDERAL SAVINGS AND LOAN ASSOCIATION AND GULF COAST SAVINGS AND LOAN ASSOCIATION	)	From Travis County
PETITIONERS	)	
V.	)	
AMERICAN SAVINGS AND LOAN ASSOCIATION, JIMMY PHILLIPS, J. T. SUGGS, ET AL., its Organizers and Directors, and J. M. FALKNER, BANKING COMMISSIONER OF TEXAS	)	Third District
RESPONDENTS	)	

This suit was filed by petitioners seeking injunctive and declaratory judgment relief against respondents as a result of proceedings before, and the action of, the State Banking Commissioner, in granting a charter, franchise and certificate to do business to American Savings and Loan Association. Specifically, petitioners sought to set aside the article of incorporation, enjoin the incorporators from doing business under the charter, and in the alternative sought a declar-

atory judgment to the effect that the Commissioner lacked authority to issue a charter because of his non-compliance with the statutory provisions set forth in Article 881a-2, V.A.C.S.

The trial court construed this suit as a collateral attack upon the validity of the charter, and at a pretrial hearing without the introduction of evidence, sustained respondents' pleas in abatement dismissing the suit as to all parties defendant for lack of jurisdiction to hear and determine the cause. On appeal the trial court's action was affirmed by the Austin Court of Civil Appeals, one of the justices dissenting, in an opinion which held that petitioners had no standing to maintain a suit for injunction or declaratory judgment. 326 S. W. 2d 567.

For purposes of brevity, Brazosport Savings and Loan Association, Fort Bend Federal Savings and Loan Association and Gulf Coast Savings and Loan Association are referred to individually or collectively as petitioners. Mr. J. M. Falkner, the State Banking Commissioner, is referred to as the Commissioner. The private respondents are referred to individually or collectively as American.

Petitioners in this case are savings and loan associations operating under charters, franchises and certificates to do business issued by the State Banking Commission pursuant to Article 881a, V.A.C.S. Through their application for writ of error they have presented to this court for determination the question of whether or not such validly operating savings and loan associations have any right to judicial protection

and relief from allegedly unlawful or illegal competition of an association which has been chartered, franchised and certificated in violation of statutory requirements.

The rules and regulations for building and loan associations, as set forth in Article 881a-2, V.A.C.S., require that applications and articles be accompanied by certain data, properly verified and sufficiently detailed and comprehensive, to enable the Commissioner to pass upon a proposed charter. By the same article the Commissioner is charged with the duty of determining the character and fitness of the incorporators, and ascertaining "whether the public convenience and advantage will be promoted by allowing such proposed building and loan association to be incorporated and engaged in business, and whether the population in the neighborhood of such place and in the surrounding country affords a reasonable promise of adequate support for the proposed building and loan association."

Many irregularities regarding the proceedings conducted by the Commissioner and the subsequent granting of authority to American to do business were alleged by petitioners. These allegations may be summarized as follows: (See Court of Civil Appeals opinion and dissent, 326 S. W. 2d 567, at page 573, for verbatim statement of pleadings.)

Petitioners allege that they are lawfully engaged in the savings and loan business in the territory concerned, are ready, willing and able to serve all public needs, convenience and advantage, their businesses be-

ing affected by public use and interest, conducted for public welfare and benefit, and that their franchises constitute valuable property rights worth many thousands of dollars. Further, that respondents American made application to serve the same area, in competition with petitioners, and filed their application contrary to the form and provisions set forth in departmental rule 2.1 and improperly acknowledged in violation of the requirements of Article 881a-29, V.A. C.S.; that a public hearing was called at which American defaulted, failing to furnish the verified data required by rule 2.1, failed to submit substantial evidence from which the Commissioner could make the determination required by said rule and Article 881a-2, V.A.C.S., and failed to meet and satisfy the proof required by law as to the several elements governing grant of a charter, franchise and certificate to do business; that the Commissioner nevertheless approved American's application, contrary to law and his rules and contrary also to the credible evidence, which is that the public convenience and advantage will not be promoted by the grant to American—in fact, that during the past twelve months the Commissioner has issued franchises to three new associations for Brazoria County, being wholly unjustified action, never elsewhere practiced, and the grant to American was made at a time when neither he nor anyone else could make a fair appraisal of public interests or evaluation of public convenience and advantage as regards American.

Further, that although the rules and regulations require the Commissioner to consider probability of in-

surance of accounts, independent quarters with ground floor location, full time, qualified management and adequate capital and support by the population, no evidence was presented on these matters sufficient to justify the Commissioner's action in making the grant and issuing the certificate to do business. Petitioners pleaded that the population does not and cannot afford a reasonable promise of adequate support, and that in no other comparable area is the population already served by so many associations, mortgage and fiscal concerns; that the credible evidence is the existing associations fully serve the area, need the business, and the grant to American will not only harm them, but will injure the public; that the Commissioner's action was taken without regard to public welfare, and was without support in substantial evidence; that he acted arbitrarily and capriciously, and in violation of law.

While the merits of this case are not before the court, the facts set forth in the allegations above must be taken as true in disposing of the cause. We need only concern ourselves here with the right of petitioners, if such right exists, to challenge the Commissioner's actions.

The objects and business of savings and loan associations are matters of public utility. Although they are privately owned, they operate in the field of public interest like banks, insurance companies, and railroads, and are properly to be considered as quasi-public institutions. Wagner v. Home Savings and Loan Association, Mo. Sup., 90 S. W. 93; Klein v. Jefferson County

Bldg & Loan Ass'n, 239 Ala. 460, 195 So. 593; 35 Words and Phrases, Perm. Ed., pocket part, p. 198; Prudential Building & Loan Ass'n v. Shaw, Tex. Comm. App., 26 S. W. 2d 168, 171. They are financial institutions of major importance to the credit system of the state, and in recognition of their public character such institutions are exempted from the corporate franchise tax in Texas. Acts 1959, 56th Leg., 3d C.S., Ch. 1, Art. 12.03.

Respondents contend that savings and loan associations are mere private corporations and that this action constitutes an attempt to restrict or restrain lawful competition. If respondent's contentions were correct, the rule that ordinary private businesses are not properly entitled to receive protection against competition might be applicable here. 43 Amer. Jur., p. 585. Such is not the case, however, for savings and loan associations are quasi-public in nature, and we do not view petitioners' claim as a right to operate free of competition, but rather as a right to operate free of *unlawful* competition, created in violation of law.

Savings and loan associations, for the privilege of operating within the state, may be subjected to reasonable regulations and control. As stated in 9 American Jurisprudence, Building and Loan Associations, Sec. 8, at p. 102:

> "In view of their quasi-public character, the state may, under its police power, subject them to a degree of supervision and regulation which would be unnecessary and unreasonable in the case of purely private corporations."

If savings and loan associations were merely corporations engaging in private business, unaffected by the public interest, the state could not lawfully require a showing of public necessity or convenience. New State Ice Co. v. Liebman, 285 U. S. 262, 76 L. Ed. 747. A necessary corollary to this requirement and the regulation and and control exercised by the state is freedom from illegal or unlawful competition. Such competition would be indirectly, if not directly, inimical to the public welfare.

The majority opinion of the Court of Civil Appeals states that the petitioners have no vested property right in the charter and certificate granted by the Commissioner to American. We are unable to determine that they claim such a right. The rights which are asserted and which petitioners seek to protect are in their own corporate beings and in the vested property rights in their own franchises. Franchises have long been considered as property in Texas. City of Wichita Falls v. Kemp Hotel Operating Co., 162 S. W. 2d 150, 153, affirmed 141 Tex. 90, 170 S. W. 2d 217; 19 Tex. Jur., p. 876. Franchises have also been described as vested rights. Laidlaw Bros., Inc. v. Marrs, 114 Tex. 561, 273 S. W. 789. See also 23 American Jurisprudence, Sec. 5, p. 717.

> "In character and nature a franchise is essentially in all respects property, and is governed by the same rules as to its enjoyment and protection and is regarded by the law precisely as other property. Invasion of a franchise is an invasion of a property right. The holder has such an interest as entitled him to defend any invasion, whether

by a public body or an individual. * * * * *" 19 Tex. Jur., Franchises, Sec. 3 at p. 876.

A franchise on which money has been expended assumes the character of a vested right. 12 Tex. Jur. 2d, Constitutional Law, Sec. 116, p. 464; Corpus Christi Gas Co. v. City of Corpus Christi, 283 S. W. 281, error refused.

When a vested property right has been adversely affected by the action of an administrative body so as to invoke the protection of due process, an inherent right of appeal is recognized. City of Amarillo v. Hancock, 150 Tex. 231, 239 S. W. 2d 788.

Article 881a, V.A.C.S., is silent with regard to an appeal from an action of the Commissioner in the granting of a charter and franchise. The fact that the statute fails to afford petitioner an appeal or judicial review has been held to be immaterial, for there are instances where courts must assume jurisdiction. Such jurisdiction is required in order that the administrative body may function where, without the right of appeal, the courts would have been forced to strike down the statute. City of Amarillo v. Hancock, supra. This court has often approved the holding in English Freight Co. v. Knox, 180 S. W. 2d 633, error refused:

> "Such right of appeal will be implied or arises under the constitutional guaranties of due process of law, if the matter is one so protected."

We believe that the question of judicial review now before us is controlled by the decision in the case of Board of Insurance Commissioners et al. v. Title In-

surance Association of Texas et al., 153 Tex. 574, 272 S. W. 2d 95. There it was argued that Article 1.19 of the Insurance Code prevented anyone but the Board from challenging the right of its licensee to carry on the business of title insurance. This court, in recognition of the rights of competitors to challenge the illegal operation said:

> "* * * We cannot ascribe to the Legislature the intention to provide by that Article that an order entered by the Board can be attacked for invalidity only by the Board itself. Such construction of the Article would, to say the least, render it of doubtful validity.
>
> "There is no provision in the statute for an appeal * * *, but the right of proper parties to subject such an order to judicial review must be implied. The property rights of parties cannot be determined by orders of an administrative agency, without a right of judicial review of such orders. * * * *
>
> "It is argued that respondents have no right to prevent competition in their business. That would be a correct proposition in the transaction of ordinary business enterprises if the competition is not illegal, but, as well stated in the opinion of the Court of Civil Appeals (264 S. W. 2d 132):
>
> " 'The business of title insurance is one affected by public use, is of public interest, and is subject to reasonable legislative control. Daniel v. Tyrell & Garth Inv. Co., 127 Tex. 213, 93 S. W. 2d 372. * * *' "

Frost v. Corporation Commission, 278 U. S. 515, 49 S. Ct. 235, 73 L. Ed. 483, was heavily relied upon by

this court in the Title Insurance case, and was recognized by the Court of Civil Appeals as "a close analogy." (264 S. W. 2d at 132). There, plaintiff was the holder of a public necessity permit to operate a gin, having obtained such upon proper showing of "necessity." The state commission granted a permit to plaintiff's competitor without regard to public necessity. Plaintiff sued to enjoin such an illegal operation and got his relief. The court said of plaintiff's rights:

> "* * * the right to operate a gin * * * as provided by the Oklahoma statute, is not a mere license, but a franchise, granted by the state in consideration of the performance of public service; and as such it constitutes a property right within the protection of the 14th Amendment.
>
> "* * * * * * *
>
> "Appellant, having complied with all the provisions of the statute, acquired a right * * * by valid grant * * *. While the right thus acquired does not preclude the state from making similar valid grants to others, it is, nevertheless, exclusive against any person attempting to operate a gin without obtaining a permit or, what amounts to the same thing, against one who attempts to do so under a void permit; in either of which events the owner may resort to a court of equity * * *.
>
> "* * * * * * * *
>
> "The purpose of the clause in respect of equal protection of the laws is to rest the rights of all persons upon the same rule under similar circumstances. * * *.
>
> "* * * That the immunity thus granted to the corporation is one which bears injuriously against the individual does not admit of doubt, since by

multiplying plants without regard to necessity the effect well may be to deprive him of business which he would otherwise obtain if the substantive provision of the statute were enforced. * * *"

Many decisions support the propositions stated by this court, and by the Supreme Court of the United States in these two cases.

In accordance with prior decisions of this and other courts with which we agree, we believe that petitioners possess a valuable and vested property right in their franchises. Petitioners' allegations of fact that this right has been infringed upon by the action of the Commissioner must be taken as true in view of the procedural status of the case. Therefore, we hold that petitioners are entitled to an opportunity to prove their allegations that the Commissioner's action was illegal or without support in substantial evidence, and to appropriate relief if this be proved. Such an opportunity is afforded to petitioners by the due process clauses of the Constitution of this state and of the United States. Vernon's Ann. St. Const., Art. I, Sec. 19; U.S.C.A. Const. Amend. 14.

The judgments of the district court and Court of Civil Appeals dismissing the cause for lack of jurisdiction are reversed and the cause is remanded for trial on the merits.

Robert W. Hamilton
Associate Justice

Associate Justice Steakley not sitting.
Opinion delivered: February 15, 1961

IN THE SUPREME COURT OF TEXAS

— — — — —

IN CHAMBERS

September 10, 1963.

No. A-8874.

Jimmy Phillips et al.	)	
vs.	)	From Travis County,
Brazosport Savings & Loan	)	Third District.
Association et al.	)	

The stipulation of the parties for additional time to appellants for docketing the case and filing of record and jurisdictional statement in the Supreme Court of the United States and request to the Supreme Court of Texas for an order granting time extension, this day filed herein, having been duly considered by the Court, in chambers, it is

ORDERED that Brazosport Savings & Loan Association et al., respondents in this Court and appellants in the Supreme Court of the United States, be, and hereby are, granted an extension of time to and including October 21, 1963, within which to docket the case, file the record and file their jurisdictional statement in the Supreme Court of the United States. Rule 13, (1), Rules of the Supreme Court of the United States.

It is further ordered that the Clerk of this Court include a true copy of the stipulation upon which this order is entered, and a true copy of this order, in the record prepared for appeal to the Supreme Court of the United States.

— — — — — — —

PORTIONS OF RULES AND REGULATIONS FOR BUILDING AND LOAN ASSOCIATIONS

PROMULGATED BY

THE BUILDING AND LOAN SECTION OF THE FINANCE COMMISSION OF TEXAS

AND

THE BANKING COMMISSIONER OF TEXAS

"CHAPTER 2. NEW CHARTER APPLICATIONS

"2.1. When articles of incorporation of a new association are presented to the Banking Commissioner for his approval, such articles shall be accompanied by the proposed By-Laws of the association and statements, exhibits, maps and other data properly verified, which shall be sufficiently detailed and comprehensive to enable the Commissioner to pass upon the proposed charter as to (1) the character, responsibility and general fitness of the persons named in the articles; (2) whether the public convenience and advantage will be promoted by allowing such proposed association to be incorporated and engage in business, taking into consideration (a) that insurance of the accounts of the proposed association has been applied for and that such insurance will probably not be refused by the Federal Savings and Loan Insurance Corporation, (b) that such proposed association will have and maintain independent quarters with a ground-floor location or its equivalent, (c) that such proposed association will have qualified, full-time management,

and (d) the adequacy of the initial capital and surplus of the proposed association; and (3) whether the population of the neighborhood of such place and in the surrounding country affords a reasonable promise of adequate support for the proposed association.

"2.2. Within ten (10) days after the filing of a proper application the Banking Commissioner shall set a date for a hearing on the application, and the proposed incorporators shall publish at least twenty (20) days before the date of the hearing, in a newspaper printed in the English language of general circulation in the county where the proposed association will have its principal office, a notice in the following form, unless another form is prescribed by the Commissioner:

"* * *

"In addition, the Commissioner shall mail notice of such hearing by registered or certified mail to all State and Federal Building and Loan Associations in the county of the proposed location or in any adjoining or adjacent counties within a proximity that might be served or affected by the proposed association.

"2.3. At least ten (10) days before the hearing date the proposed incorporators shall file proof of publication in the manner above provided with the Commissioner, and if ten (10) days before the hearing date the Commissioner has received no written statements of intention to appear in person or by attorney to protest the application from one or more parties, the hearing may be cancelled by the Commissioner. The Commissioner shall notify the proposed incorpo-

rators at least five (5) days before the date of the hearing whether or not a hearing will be held.

"2.4. The Commissioner shall render his decision within forty-five (45) days after the hearing or after the date on which the hearing is cancelled, and at the time he makes his decision on the application he shall file in his office a written memorandum stating the reasons therefor, which shall be open to public inspection.

"2.5. When requested by the proposed incorporators, a hearing shall be held on the application even though there are no persons who have indicated a desire to be heard against it."